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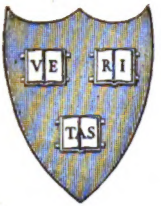

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THE

BENGAL TENANCY ACT.

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Bengal. Laws, statutes, etc. Landlord and tenant law

THE

BENGAL TENANCY ACT

BEING

Act VIII of 1885.

AS AMENDED UP TO DATE

WITH

NOTES, JUDICIAL RULINGS, RULES, AND NOTIFICATIONS, &c., &c.

FOURTH EDITION.

Revised, Rearranged and much Enlarged.

BY

Kedar Nath ROY, M.A., B.L., C.S.

DISTRICT AND SESSIONS JUDGE, BENGAL.

Calcutta:

MAJUMDAR PRESS,

155, Bow Bazar Street.

1906.

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India : Separate Acts

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CALCUTTA :

PRINTED BY MAJUMDAR PRESS.

PUBLISHED BY MESSRS. SEN & SEN.

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PREFACE TO THE FOURTH EDITION.

THE present work is a considerable improvement on the previous editions of my work on the Rent Law of Bengal. The Patni Laws and the Revenue Sale Acts have been expurgated from it, as they served to increase the bulk of the book and have not found favor with the public and it is now confined to the Bengal Tenancy Act alone, which has been completely revised, re-arranged and much enlarged. Obsolete passages and decisions have been struck out and fresh matter introduced to suit the present circumstances and to bring the cases up to date. The latest decisions on most important points connected with rent and revenue have been inserted.

My best thanks are due to Mr. P. N. Sengupta, Bar-at-law, who allowed me to use his collection of decisions for 1904 and 1905. I am also indebted to him for the Nominal as well as the General Index which, it is trusted, will be found exhaustive.

JESSORE,
February 1906.

K. N. ROY.

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PREFACE TO THE FIRST EDITION.

THE author of this work has made Rent Law of the Lower Provinces the subject of his study for a good many years, and was engaged in the discussion of the revision of the Rent Law that was under the consideration of the Government from 1879 to 1885. It was upon his articles which appeared in the *Statesman* under the initials "K. N. R.," that the British Indian Asssciation, and the Central Union Committee of Landholders, based their last petition to the Government of India against the changes proposed by the Bengal Tenancy Bill No. 1 and it was due to them that the Select Committee had to abandon the hybrid proposal about giving a statutory transferable character to the occupancy-right while restricting it by the technical law of pre-emption, and to modify the proposal about fixing the maximum rent recoverable from the tenant. After the Bengal Tenancy Act was passed, it occurred to him that he might with advantage bring out a work on the Rent Law of Bengal—an idea in which he was encouraged by his friends and subscribers.

This little volume is intended to be a treatise on the Rent of Bengal, and not merely a digest of the existing decisions. All the important rulings of the several High Courts and the Privy Council bearing upon the law have been quoted and extracts from the reports of the Rent Commission, and the Select Committee, the Minutes of the Hon'ble Judges of the High Court and the speeches and debates of the Hon'ble Members in Council, have been added in explanation of the text. The sections of the old Act have been reproduced under the corresponding sections of the new Act, and their differences explained. The interpretations of the sections have been supported and elucidated by the reference to the decisions of the Courts, drawing a careful line of distinction between obsolete and current decisions, and showing how they can be used with reference to the new Act. While no pains have been spared to make the abstracts of decisions intelligible and accurate, in accordance with the suggestion of a member of the profession, where necessary, instead of merely giving the *placitum*

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of the decision, the author has quoted the Judges *in extenso*. He has further traced the history of the important provisions of the Act in the earlier Acts and Regulations, and shown how they have been developed.

The Appendix contains the rules framed by the Government of Bengal, the High Court of Calcutta and the Board of Revenue, the Patni Regulation, and select provisions of several enactments bearing upon the Rent Law of Bengal. The Index is meant to be a complete summary of the provisions of the Act.

The author has thus endeavoured to make this volume as complete in itself as the circumstances have permitted, and he leaves it now to the public and the profession to judge of its merits. If those who by the light of superior knowledge are able to discover errors and deficiencies in his treatment of the subject are willing to assist him in correcting those errors and amending those deficiencies, they will, by communicating with him, place him personally under a great obligation.

He has only to regret that want of time and space has compelled him to withhold a good deal of valuable matters from the Appendix, and to hurry through the Introduction.

CALCUTTA,
15th February 1886.

AUTHOR.

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ABBREVIATIONS.

Agra	Reports of cases decided by the High Court of the North-Western Provinces at Agra, from 1866—1868.
All.	Reports of cases decided by the High Court of the North-Western Provinces at Allahabad, from January 1869.
B. & C.	Burnwell's and Cresswell's Reports, K. B.
Beav.	Beavan's Reports, Rolls Court.
Bing.	Bingham's Reports, C. P.
Board's Rep.	Decisions under the Rent Law, published at the instance of the Board of Revenue at Calcutta.
B. R. Rules	Board of Revenue Rules.
1 B. L. R.	Bengal Law Reports, Vol. I.
B. L. R., A. C.	Ditto ditto, Appellate Jurisdiction.
B. L. R., F. B. ...	Ditto ditto, Full Bench case.
B. L. R., S. N. App. ...	Ditto ditto, Short notes in the Appendix.
B. L. R., Sup. Vol. ...	Ditto ditto, Supplemental volume of Full Bench cases.
1 C. L. R.	Calcutta Law Reports, Vol. I.
1 C. W. N.	Calcutta Weekly Notes, Vol. I.
1 Hay	Hay's Report, Vol. I.
H. C. Rules	High Court Rules.
Ind. Jur., O. S. ...	Indian Jurist (Old Series).
Ind. Jur., N. S. ...	Ditto (New Series).
1 I. L. R., All. ...	India Law Reports, Allahabad Series, Vol. I.
1 I. L. R., Bom. ...	Ditto, Bombay Series, Vol. I.
1 I. L. R., Cal.	Ditto, Calcutta Series, Vol. I.
1 I. L. R., Mad. ...	Ditto, Madras Series, Vol. I.
L. R., 1 H. L	Law Reports, 1 Horse of Lords Cases.
M. & G.	Manning and Granger's Report, C. P.
Marsh.	Marshall's Reports.
Mer.	Merivale's Reports, Chancery.
1 Moo. I. A.	Moore's Indian Appeals, Vol. I.
Stark.	Starkie's Reports N. P.
Str.	Strange's Reports, K P.
Ves. ...	Vessy's Junior's Reports, Chancery. Vessy's Senior's Reports, Chancery.
1 W. R.	Sutherland's Weekly Reporter, Vol. I.
W. R. (1864)	Ditto ditto, cases decided in 1864.
W. R. (Act X) ...	Ditto ditto, cases under Act of 1859.
W. R. F. B.	Ditto ditto, Full Bench cases.
W. R. P. C.	Ditto ditto, Privy Council cases.
W. R. Sp.	Ditto ditto, Special number of Full Bench cases.

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INTRODUCTION.

THE land tenure of India is a problem of intrinsic difficulty. Among the numerous changes that have taken place in public opinion on different subjects within the last century, there is perhaps none more decided than those that have arisen in regard to the theories of land tenure. Mr. Elphinstone remarks[1]: "Many of the disputes about the property in the soil have been occasioned by applying to all parts of the country facts which are only true of particular tracts, and by including in conclusions drawn from one sort of tenure, other tenures totally dissimilar in their nature." This statement has been questioned with some truth by Sir George Campbell: "It is sometimes said," he writes,[2] "that India is composed of so many different countries that we can never speak of it as whole. I do not think that that is the case in the full sense in which the statement is made. Probably, six or eight hundred years ago, in the European countries which had been conquered and ruled first by the Romans, and then by the Germanic peoples, there was a greater similarity of institutions and manners than in modern days. Similarly it has happened that, however different may have been the aborigines of different provinces of India, they have been covered by successive waves, first of Hindu populations, and then of Mahomedan conquerors, and so have been assimilated in perhaps a greater degree than ever were European countries." We accept this dictum, because the materials for researches into the Hindu system of land tenures are often scanty, and every writer on the subject has been as a matter of necessity compelled to rely upon facts recorded in comparatively late times, and upon such remains of ancient institutions as are still existing in different parts of the country. A few passages in Manu, modern descriptions of the village communities and the land system, with such relics of these as may be still surviving are almost all that we possess to carry on a fruitful investigation.

It is said that the village is the key to the Hindu land system. According to the picture of the Hindu society presented by the Code of Manu, the Government was vested in an absolute monarch acting under the counsel of Brahmins,

Who is the owner of the soil?

but the Code does not distinctly lay down to whom the absolute property in the soil belonged. It has been argued that it belonged to the king, because he is called the "lord paramount of the soil." The cultivator's proprietary right has, on the other hand, been deduced from the text. "Sages pronounce cultivated land to be the property of him who cut away the wood or who cleared and tilled it[3]—a general principle that obtains in the Mahomedan law too and is recognised in Germany, Java, and Russia,[4] and indeed in most countries. It has heen also said with considerable force that as the king's share of grain was limited to one-sixth or at most one-fourth, there must have been

The King.

The cultivator.

1 History of India, p. 73.
2 Campbell's Cobden Club Essay, p. 1.
3 Manu, Chap. IP, Sl. 44 (Sir Wm. Jones' translation).
4 See articles by M. de la Veley in the *Revue des Deux Modes* for 1872, entitled Le Formes Primitives de la Propriete, Tome 100, p. 626.

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another proprietor for the remaining five-sixths or three-fourths. On the other hand, there are texts which seem to contemplate exclusive and perhaps individual rights in land. The owner of the field, for instance, is directed or advised to keep up sufficient hedges [1]; he is entitled to the produce of seeds sown by another in his land unless by agreement with him[2]; and to the produce of seed conveyed upon his land by wind or water [3]; similarly the probability of a dispute between neighbouring land-holders or villagers as to boundaries is contemplated [4]; and a penalty is provided for forcible trespass upon another's land. [5] The sale of land is also spoken of in connection with the sale of metals. [6] These passages no doubt indicate that some conception of an exclusive right may have been entertained, but they fail to show whether the owner spoken of had anything more than a right to cultivate and appropriate the produce, and a right to such possession as may be incidental thereto. In connection with these passages, Sir H. Maine observed [7]: "It is sometimes said that the idea of property in land is realised with extreme distinctness by the natives of India. The assertion is true but has not the importance which it at first appears to possess. Between village community and village community between total group and total group, the notion of an exclusive right to the domain is doubtless always present, and there are many striking stories current respecting the tenacity with which expelled communities preserve traditions of their ancient seat. But to convince himself that, as regards the interior of the group, the notion of dependent tenures connecting one stratum with another is very imperfectly conceived, it is only necessary for an impartial person to read or listen to the contradictory statements made by keen observers of equal good faith." Indeed we are too apt to forget that property in land, as a transferable mercantile commodity absolutely owned and passing from hand to hand like any chattel, is not an ancient institution, but a modern development, reached only in a few very advanced countries. In the greater part of the world the right of cutlivating particular portions of the earth is rather a privilege than a property—a privilege first of a whole people, then of a particular tribe, or a particular village community, and finally, of particular individuals of the community.

The village.

It is now a recognized principle that the ownership as conceived by the people of the earliest times was with the village community, which doubtless existed before Kings or Sovereigns. It seems at the outset to have been an association of kinsmen, united by the assumption of a common lineage. Sometimes it was unconnected with any exterior body save by the shadowy bond of caste. Sometimes it acknowledged itself to belong to a larger group or class. But in all cases the community was so organized as to be complete in itself. The end for which it existed was the tillage of the soil, and it contained within itself the means of following its occupation without help from outside. Besides the cultivating families who formed the major part of the group, it comprised families hereditarily engaged in the humble arts which furnished the little society with articles of use and comfort. It included a village watch and a village police, and there were systematized authorities for the settlement of disputes and the maintenance of civil order. It was in short a little corporation which was almost self-governing. [8] "The village com-

1 Chap. VIII, Sl. 239.
2 Chap. IX, Sl. 49, 52, 53.
3 Chap. IX, Sl. 54.
4 Chap. VIII Sl. 245, 246.
5 Chap. VIII, 264,
6 Chap. VIII, Sl. 222.
7 Village Community, 3rd edition, p. 180.
8 Directions for Revenue Officers, 31.

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munites," says Lord Metcalfe, "are little republics, having nearly everything that they want within themselves, and almost independent of any foreign relations."[1] But the most prominent factor in a village is that of the joint family, the unit of Hindu society. That the village is primarily an association of kinsmen united by family tie is apparent to those who have traced the advent of the Aryan race to this country. The race moved in families and colonised as well as conquered the country, and the joint family with its development gradually formed a village.[2] The tradition of a common descent is preserved in the custom by which villagers commonly describe their fellow villagers as brothers, although apparently not related in any way.

New villages in the course of progress sprang up by offshoots from the original stock, and colonisation expanded over a large area. But it would be a mistake to suppose that the community was entirely made up of members of the same family, and contained no heterogeneous element in it. Struggle for existence with man, savage enemies, and nature, forced an amalgamation of strangers with the village group, and united them in the same brotherhood. By this process the community gradually consisted of divisions into several paralled social strata. They are first a certain number of families, who are traditionally said to be descended from the founder of the village. Below them there are others distributed into well ascertained groups. "The brotherhood,' says Sir Henry Maine,[3] "in fact forms a sort of hierarchy, the degrees of which are determined by the order in which the various sets of families were amalgamated with the community. The tradition is clear enough as to the succession of the groups, and is probably the representation of a fact. But the length of the intervals of time between each successive amalgamation, which is also sometimes given, and which is always enormous, may be safely regarded as untrustworthy." The relation of these component sections to one another is a problem which of all others has perplexed the statesmen and politicians of India most, because it has been necessary to translate them into proprietary relations, and to evolve a law of tenure and tenancy not only outside but inside the cultivating group.

The relation of tenant and tenancy.

So long as the structure of a village community is simple, so long as it is a united by a common descent, the ideas of rent and of the relation of landlord and tenant are dormant. All that was cared about was the subsistence of the common group, which the soil could yield. The fields under tillage were held in common by the families composing the community as in the Russian *Mir*;[4] but the arable mark shifted from one part of the general village domain to another. At some period of the existence of the community a further development took place, when the arable area was distributed in exactly equal portions according to the number of free families in the township,[5] and the proprietary equalities of the families composing the group was further secured by the periodical

1 In his minute of 8th November 1830, in the Appendix No. 48, to the report of the Select Committee of the Hous of Commons on the affairs of the East India Company, dated 16th August 1832, cited in selections from Govt. Records, Vol. I, p. 446, and in Elphinstone's History of India, p. 68.

2 Maine's Village Communities, 175; Cambell's Cobden Club Essay, 161; Fifth Report, Vol. II, 628; Evidence of Mr. Fortescue before the Select Committee of the House of Lords (1830) 509.

3 Village Community, p. 177.

4 Revue des Deux Mondes, Tome 169, p. 141.

5 Stube's Law and Custom of Hindu Caste, 207.

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re-distribution of the several assignments. Gradually the share of each family was stereotyped, and redistribution ceased to exist. When this stage was reached, the introduction of strangers was only possible by payment of rent. "The utmost available supply of human labour,"[1] observes Sir Henry Maine, "at first merely extracts from the soil what is sufficient for the subsistence of the cultivating group, and thus it is the extreme value of the new labour which condones the foreign origin of the new hands which bring it. No doubt there comes a time when this process, ceases when the fictions which conceal it seem to die out, and when the village community becomes a close corporation. As soon as this point is reached, there is no doubt, that any new comer would only be admitted on terms of paying money or rendering service for the use and occupation of land. But in India at all events another set of influences came into play which had the effect of making vestiges of the payment of rent extremely faint and feeble." It is worthwhile to note these points carefully; one stage in the transition from collective to individual property was reached when the part of the domain under cultivation was allotted to several families of the community; another was gained when the system of "shifting severalties" came to an end, and each family was confirmed for perpetuity in the enjoyment of its several plots of land. The third was the introduction of strangers in the village upon the conditions of tenure and tenancy.

The idea of a chief arose from the *paterfamilias* of the Aryan race which founded that village. The elementary group is a family connected by common subjection to the highest male ascendant or the *paterfamilias*. The aggregation of families forms the gens or house with its chief. The aggregation of houses makes the tribe with its chief, and the aggregation of tribes constitutes the commonwealth with the king as its head. In his inception therefore the king is the member of the community, and he is known among the Hindus as the father of his people. If then we are asked, who is the owner or proprietor of the soil?—the cultivator, the constitution, or the king?—our answer is all of them, or the general community. This assertion may seem to be singular, but in truth it is the most natural of all ideas on the subject. Manu, for instance, treats waste land as nobody's property until brought into cultivation; and the Mahomedan view is still stronger. It treats waste land as not existing, and brought into life by cultivation. Cultivation being the primary duties of the community, its very existence depending upon it, the cultivator became the first essential of the village. He had the lion's share of the produce of land. But the village had other wants of nature, and it maintained a machinery for internal administration with the headman as its chief; and in lieu of the services rendered by the village officers, each received a share in the produce. The constitution is, therefore, the second essential of the village. The king or the State had also a share in the produce in the village and he is the third element.

The King.

To begin with the King or Sovereign: We have cited the earliest text that bears upon his rights to the soil. The King is recognised as entitled to have a share in the produce. According to Manu his share is one-eighth, one-sixth, or one-twelfth as the nature of the soil and the labour necessary to cultivate it vary;[2] but in time of prosperity he should take only one-twelfth,[3] while in times of urgent necessity he may take

1 Village Community, p. 178.
2 Chapter VIII, Sl. 130.
3 Chapter XVI, Sl. 120.

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one-fourth.[1] This is the King's due on account of the protection he is bound to afford to the cultivators.[2] The King is also entitled on the same grounds to half of old hoards and precious metals in the earth.[3] These shares are, however, only true from a theoretical point of view. As to the proportion actually taken, at least in later Hindu times, a considerable difference of opinion prevails. Sir George Campbell says that the King took from one-tenth to one-eighth of the gross produce.[4] Mr. Shore and other authorities say one-sixth;[5] others again give the proportion as something less than one-fourth of the gross produce;[6] and Sir Thomas Munro puts it as high as from two-fifths to three-fifths.[7] There is a further opinion that the cultivator got half the paddy produce, or grain in the husk, and two-thirds of the dry grain crop watered by artificial means; this was, after all deductions for village officers were made, the net crop.[8] The King's share was generally paid in kind, but sometimes in money specially in the case of garden produce;[9] and out of his share the revenue establishment had to be paid.

The cultivator.

There were three classes of cultivators having an interest in the soil. We have, first, the original settlers and their descendants; second, the strangers who migrated into the village and either permanently or temporarily settled there; and, third, those who without living in the village cultivated the land of the village. It is the status and incidents of the second class of cultivators that have caused the main difficulties to the writers on the subject. We have already seen how the strangers were introduced into the village at the inception of the community. It was the struggle for existence with man and wild animals and with exuberant nature which first led the Aryan groups to submit to an amalgamation of strangers with the brotherhood. They had more land at their command than they could themselves cultivate; there was no scarcity of lands, and they naturally allowed strangers to cultivate them. When these immigrants offered unmistakable proofs of settling as permanent inhabitants in the village, building and clearing and establishing themselves as members of the village community, and ready to undertake a share in the responsibilities attaching to that position,[10] the distinction between them, and the original settlers would gradually grow indistinct, and they would be absorbed in them. But so long as the assimilation did not take place, these immigrants would be reckoned as belonging to the third class of cultivators. There was a second process by which the community attracted to themselves extraneous elements. It was when a member of the community sold or mortgaged his right to a stranger. This was not, however, frequent except in the later stage of the township, This process is pretty well described by Carnegy:[11] "When by the process just described" (subdivision by inheritance) "one estate had expanded into several separate properties, it not

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1 Chapter XVII, Sl. 118, 120.
2 Chapter IX, Sl. 118, 119.
3 Chapter VIII, Cl. 39.
4 Campbell's Cobden Club Essay, 155; Orissa, Vol. I, 32 to 35.
5 Harrington's Analysis, Vol., 230 Ayen Akbarry, Vol. I, 347, 348. Whinfield's Landlord and Tenant, 74, note a; Elphinstone's History of India, p. 298.
6 Fifth Report, Vol. II, 79, 83, 456.
7 Robinson's Land Revenue 17, Orissa, II, 166.
8 Fifth Report, Vol. II, 8.
9 Land Tenure by a Civilian 21, Fifth Report, Vol. II, 8, 9, 41, 59.
10 Campbell's Cobden Club Essay, 165, Directions for Revenue officers, 65.
11 Land Tenures, 5 & 6.

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unfrepuently happened afterwards that one or more of their properties were overtaken by misfortune, and the proprietors were reduced to every sort of shift to save their land, or to make the most they could in parting with it. One member of the community would seek the protection of a chief of his own clan and make over his holding in trust to him, another would take his holding to that chief's rival, in view of establishing a balance of power, lest the whole village should be absorbed by the first chief; a third would want the official protection of a *kanungo*; a fourth would crave shelter from a Brahmin of note, relying on his sacred calling to secure his possession; a fifth would mortgage to a moneylender; and a sixth might sell to a neighbouring capitalist; and the result of all this would be that people of different tribes and possessions varying in number from two to ten would gain and did gain a footing in those subdivided villages."

Leaving aside this second process of assimilation, a question has often been hotly discussed as to whether length of time was essential for the acquirement of the rights of the first class of cultivators or khudkashts.

Immigrant.

It is true if a stanger gave unmistakable proof of his intention to settle in the village as a permanent resident, that would guarantee his union with the village community. But how was the intention proved? A primitive group of races had no organised code of evidence as we possess, and it is doubtful even if their intelligence had reached that stage of refinement which enables a person to appreciate evidence and proof in a systematic and formal way. When a stranger would first come in, he would be looked upon by them with a jealous eye as an interloper; when the circumstances of the country would disclose themselves, and the struggle for existence would compel them to seek for help, that jealousy would gradually fade; and when the stranger would offer terms of friendship and bear the responsibilities of the community, he would be taken in. Thus, though his assimilation would not depend upon any length of time he had occupied, yet his disposition to become a permanent settler could hardly be satisfactorily proved without some length of possession. Intention to settle in the village was no doubt, the criterion to admit him into the community, but that intention in a primitive age had to be gathered by some length of possession. Accordingly, those who had settled in the village for more than one generation were generally considered to have sufficiently shown their intention, and such settlers become recognised as *chupperbund* cultivators[1] The truth of this assertion may be verified by a reference to the present custom of the country. In India if a stranger comes and settles in a village, his residence, when he or the new villagers are asked will always be described as his former village, and it is not before one or two generations pass that his descendants will describe themselves as belonging to the village in which he has newly settled. The following passages of Mr. Shore (afterwards Lord Teignmouth) quoted in Harrington's Analysis, will show that according to him length of possession was not an element which was to be entirely discarded: "It is understood that raiyats by *long occupancy* acquire a right of possession in the soil and are not subject to be removed."[2] So "to require that the pottas should be given for a definite time as proposed by some of the Collectors would diminish the force of that *prescription* which has established a right of occupancy iu favour of the raiyats."[3] And again, "except in particular instances of khudksht raiyats, who from *prescription*

1 Robinson's Land Revenue, 15, 41.
2 Extract from Harrington's Analysis, p. 267.
3 Ib., 281.

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have a privilege of keeping possession as long as they pay rent stipulated for by them." [1] So "those who cultivate the lands of the village to which they belong either from *length of occupancy* or other cause have a stronger right than others." [2] For further discussion on the subject, the reader is referred to pp.—*post.*

Now having dissolved the intermediate class of cultivators, the immigrants, into either the first or the third class as the assimilation was effected or not, we have only two classes of cultivators, the khudkashts and the paikashts. The immigrants when they were permanent settlers and were absorbed into the community were ranked with khudkashts, and when they were mere sojourners and were not assimilated with the village group were ranked with paikashts. Sir George Campbell says that "in the general language of the country a distinction was made between raiyats who had settled as permanent inhabitants of the village and had given pledges by building and clearing, and establishing themselves and accepting a share of common obligations, and the temporary sojourners or cultivators from another village." [3] Hence is it that most of the authorities on this subject make a distinction of only two class of raiyats, the khudkasht and the paikasht.

The khudkasht.

The original settlers with their descendants and those cultivators who had been admitted to share the same privileges, formed the class of khudkasht raiyats; their rights were regulated by custom; they had an hereditary right to cultivate the lands of the village. Mr. Shore says: [4] "Pottas to khudkasht raiyats or those who cultivate the land of the village where they reside are generally given without limitation of period, and express that they are to hold the lands and pay the rents from year to year. Hence the right of occupancy originates. * * * I understand also that this right of occupancy is admitted to extend even to the heirs of those who enjoy it." [5] They were called *chuppurbund*, *mourasi*, and *thami* [6] (from *sthaniya* local) *basinda, kaimi kadimi in* Hindu times. Even now the raiyats are classified in Orissa as *thani* and *pahi* raiyats. They could not be ousted while they continued to hold their holdings andpay the customary revenue. Mr. Shore observed that they have "a privilege of keeping possession as long as they pay the rent stipulated for by them." [7] Sir George Campbell says: "They had a moral claim to hold while they cultivated and paid rent." [8] So it is stated [9] that their "right of possession is considered stronger than that of ordinary raiyats." The right of possession of this class of cultivators was so strong that even if they abandoned their holdings, or lost them by not keeping up the cultivation or by failing to pay

Ouster.

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1 Ib., 307.
2 Ib., 252.
3 Campbell's Cobden Club Essay, 165.
4 Harrington's Analysis, p. 272.
5 See also Whinfield's Law of Landlord and Tenant, p. 15; Orissa, Vol. II, 206; Directions for Revenue Officers, 5, 61, 62; Fifth Report, Vol. II, 299, 301; Harrington's Analysis, Vol. III, 353; Campbell's Cobden Club Essay, 165; Land Tenure by a Civilian, 66, 68, 80.
6 Campbell's Cobden Club Essay, 165; Orissa, Vol. II, 242; Directions for Revenue Officers, 64.
7 Harington's Analysis, 301; Colebrookes, 395.
8 Campbell's Cobden Club Essay, 165.
9 Harington's Analysis, Vol. II, 64; Vol. III, 460, 426, 252; Fifth Report, Vol. I, 140, 162, 164.

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the revenue, they or their descendants could, at any distance of time, reclaim them on the payment of a sufficient compensation to the holder. [1] They could dig wells upon their land and let out water. [2]

Rent payable.

They paid the customary rent, but it was higher than the rate of other cultivators of former times, [3] in consequence of there being want of competition for lands. [4] In some places, when the assessment was once fixed, custom prohibited a measurement of the land with a view to surcharging the khudkashts. [5] If, however, they failed to cultivate or to pay rent they would forfeit their holding—a penalty which as may be supposed in the scarcity of cultivators was generally waived for an increased payment. [6]

Transfer.

Their holdings, however, were not transferable. Mr. Shore says: "On the whole I do not think raiyats can claim any right of alienating the lands rented by them by sale or other mode of transfer." [7] Mr. Harington agrees with this. [8] Sir George Campbell says: "These holdings were practically not transferable by sale, and there was not enough profit derived from them to lead to a systematic underletting." [9]

Pyekasht.

The other class of cultivators were paikashts proper, who came from another village, usually a neighbouring one, to cultivate the lands of the village which the khudkashts were unable to cultivate, [10] or who were mere sojourners in the village. [11] They were called *paikasht* raiyats from *pahi* near, or *pá* the foot and *kasht* cultivation. They were tenants-at-will, but they could not be ousted between sowing and harvest. Their interest was of an uncertain and precarious description, and used to be settled by contract.

The village constitution.

We now come to the village constitution, which consisted of the following officers:—

1. Headman.
2. Accountant.
3. Watchman.
4. Priest.
5. Schoolmaster.
6. Astrologer.
7. Smith.
8. Carpenter.
9. Potter.
10. Washerman.
11. Barber.
12. Cow-keeper
13. Doctor.
14. Musician.
15. Poet, Minstrel, and Geneologist.

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1 Land Tenure by a Civilian, 82; Fifth Report, Vol. II, 87, 496, 77, 78, 456, 487, 465, 472, 477, 481.

2 Land Tenure by a Civillian, 80; Directions for Revenue Officers, 5.

3 Campbell's Cobden Club Essay, 157; Orissa, Vol. II, 242; Fifth Report, Vol. I, 40.

4 Campbell's Cobden Club Essay, 164; Directions for Revenue Officers, 41; The Great Rent Case, B. L. R., Sup. Vol., 253, 279, 295, 296.

5 Fifth Report, Vol. I, 165.

6 Fifth Report, Vol. II, 313, 456.

7 Extracts from Harington's Analysis, p. 281; Fifth Report, Vol. I, 162.

8 Harrington's Analysis, Vol. III, 460; Thomason's selections. 478.

9 Campbell's Cobden Club Essay, 170, 171.

10 Fifth Report, Vol. II, 308; Whinfield's Landlord and Tenant, 16; Robinson's Land Tenures, 15.

11 Fifth Report, Vol. II, 41, 42, 87, 308, 491, 493; Campbell's Cobden Club Essay, 165.

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The headman.

Each of these persons got a share in the produce of the cultivation in lieu of his services. But it is the headman with whom we are mainly concerned, and in considering his position we shall arrive at some understanding of the revenue system of the Hindu Government and of the relations between the king and the community. The headman is referred to in Manu as the lord or superintendent (*adhipati*) of a village[1] (*gram*), and he is to have the share of the king in food, drink, wood and other articles as his perquisites.[2] Above him the superintendent of ten villages is to have the produce of two plough-lands; the superintendent of twenty villages is to have the produce of five plough-lands; and the superintendent of one hundred villages that of a small town; and of one thousand villages that of a large town.[3] He was a partly elective and partly hereditary officer and combined the functions of head of the Municipality with those of an officer and representative of the Government.[4] He was supposed to derive his right to the office through his descent from the founder of the village.[5] His duty was to adjust the revenue of the village and collect it for the King or the State. He arranged all the details of the assessment, ascertained the extent of each holding in the village, estimated the growing crop, and caused the threshed corn-heaps to be weighed, and apportioned the revenue by estimate or by actual outturn. He also received the share which represented the revenue and delivered it in kind to the Revenue Collector. He settled the share to be paid by each raiyat towards *deh khurcha* (or village expenses). For his emoluments, he received a few bighas of land free of revenue for a garden, and he paid $\frac{2}{5}$th to $\frac{1}{4}$th of his grain crop as revenue, while other villagers paid higher rates, and he was charged from $\frac{1}{5}$th to $\frac{1}{3}$rd less than ordinary raiyats for his other crops of a superior kind.[6] In him, therefore, we can trace the earliest germ of a zemindar.

The Mahomedan Period.

The same parties, the cultivator, the village constitution, and the King or the State existed during the Mahomedan period, but the village was repressed and the zemindar took its place. The Mahomedan epoch is famous for the development of the zemindar. At the outset we find a long struggle between the opposing principles of the Hindu system which was essentially hereditary and the Mahomedan system which was anti-hereditary.[7] The Hindus clung to their hereditary principle, and the Mahomedans sought to cut it down as much as possible, and where it proved too strong for them, insisted at least upon the formal recognition of the principle of choice, for instance by requiring the acceptance of a sanad and the payment of fees on succession in many cases. The machinery for collecting the revenue, however, continued the same. From motives of policy and convenience the conquerors were content to realise the the revenue in the ancient way, and through the established agencies.[8] The

1 Chap. VII, Sl. 115.
2 Chap. VII, Sl. 119.
3 Chap. VII, Sl. 118.
4 Harrington's Analysis, Vol. II, 67; Campbell's Cobden Club Eassay, 163; Fifth Report, Vol. II, 13, 157; Land Tenure by a Civilian, 76; Robinson's Land Tenure 69.
5 Fifth Report, Vol. I, 18; Orissa, Vol. II, 249-251.
6 Land Tenure by a Civilian, 80.
7 Campbell's Cobden Club Essay, 152.
8 Land Tenure by a Civilian, 32; Fifth Report, Vol. I, 17; Vol. II, 169; Harrington's Analysis, Vol. II, 239; Patton's Asiatic Monarchies, 162.

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headman, therefore, where the village communities were in their vigour continued to collect the State share of the produce; elsewhere he was displaced. Where he retained his position, he dealt with the State direct as *huzoori*; *malgoogar* under the old Hindu titles of *mukuddums*, *munduls* and *bhuinias*.[1] But in other places the ancient rajas and revenue collectors became talukdars and zemindars, and collected revenue as such, *amils* being appointed to check or control them. When they were powerful and paid revenue for their district direct to Government, they were called independent talukdars. When they paid through a superior fiscal officer of the pergunna or division, they were called dependant talukdars, and the superior officer was the zemindar. Thus arose zemindars and talukdars whose position and status developed in course of time.

Sir George Campbell on the growth of the zemindar.

"In the days when Mahomedan rule was vigorous," says Sir George Campbell,[2] "there was little intermediate tenure between the State and the people; but in proportion as the central power declined, smaller authorities rose. In the long period of anarchy there was, under a nominal imperial rule, a partial return in many parts of the country to the Hindu system of petty chiefship. Out of these the large modern zemindaries have sprung. I would trace them to the following principal origins:—

"*First*—Old tributary rajas. who have been gradually reduced to the position of subjects, but have never lost the management of their ancient territories, which they hold rather as native rulers than as proprietors. These are chiefly found in outlying border districts and jungly semi-civilized countries.

"*Second.*—Native leaders, sometimes leading men of Hindu clans, sometimes mere adventurers, who have risen to power as Guerilla plunderers, levying blackmail, and eventually coming to terms with the Government, have established themselves, under the titles of zemindars, polygars, &c., in the control of tracts of country for which they pay a revenue or tribute, uncertain under a weak power, but which becomes a regular land revenue when a strong power is established. This is a very common origin of many of the most considerable modern families, both in the north and in the south. To our ideas there is a wide gulf between a robber and a landlord, but not so in the native view. It is wonderful how much, in times such as those of the last century, the robber, the rajah and the zemindar ran into one another.

"*Third.*—The officers whose business it was to collect and account for revenue have frequently, in disturbed times, gained such a footing that their rendering of an account becomes almost nominal, and practically they pay the sum which the ruling power is willing to accept, and make the most of their charges.

"*Fourth*—I have alluded to mercantile countries for the dues payable by the raiyats, held by persons in the position of farmers generally. To a weak Government this system was very tempting, and in the decadence of the Mogul empire, enterprizing bankers and other speculators taking contracts of this kind, exercised great authority and handed it down to their successors."

The tendency of everything Hindu is to become hereditary. The son becomes by the mere fact of his birth, the partner of his father, and so a family interest is established in everything. Thus contracts and other holdings passed

1. Land Tenure by a Civilian, 43; Orissa, Vol. I, 244, 247, 248, 264.
2 Cobden Club Essay, 141. 142.

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from father to son, and when we found them well-established, the holder had passed into the category of zemindar.

Discussion of the status of zemindar between Mr. Grant, and Mr. Shore and Lord Cornwallis.

The position of the zemindar was the subject of much discussion before the Permanent Settlement. In his Political Survey of the Northern Sircars, dated the 20th December 1784, and in his Analysis of the Finances of the 27th April 1786, Mr. Grant, Seristadar, argued the official position of the zemindar, and the paramount right of the State to the absolute property in land. But on the 2nd April 1788, Mr. Shore produced an elaborate minute,[1] giving a sketch of the Mahomedan system from which he deduced "that the rents belong to the Sovereign, and the land to the zemindar,"[2] in opposition to the opinion of Mr. Grant, and to an opinion of the Board of Reveue that the zemindari "was a conditional office anuually renewable on defalcation."[3] Again on the 18th June 1789 Mr. Shore recorded the minute,[4] which was the basis of the Permanent Settlement. On the 18th September 1789, Lord Cornwallis answered Mr. Shore on the subject of the propriety of permanent settlement to which he was opposed and considered that he had "most successfully argued in favour of the rights of the zemindar to the property of the soil." So in his minute of the 3rd February 1790, Lord Cornwallis says: "I admit the proprietary rights of the zemindar."[5] The arguments on both sides of this question have been thus succinctly summarized by Mr. Field[6] in his *Bengal Regulations:*

Mr. Field's summary of the discussion.

"Those who looked chiefly at the one class of zemindars were convinced that a zemindari was an hereditary proprietary right in the soil, very similar to, if not identical with, an Englishman's right in his estate. Those who confined their attention to the latter class contended that it was nothing but an office; and when pressed with instances of regular succession, replied that it was the tendency of all offices to become hereditary under the particular system. The holders of the latter opinion argued that the principle of dividing the produce with the cultivators annihilates the idea of a proprietary inheritable right—that the existence of the *sanad* proves investiture essential—that a zemindari is expressly called a *service* in the sanad, the terms of which assign duties but convey no property—that a fine was paid to the Sovereign as a preliminary to investiture—and that security was taken for the personal appearance of the zemindar—all which are inconsistent with the notion of a proprietary right in him. Those who maintained the former view replied that the State claimed merely a share of the rents or produce, and this was not incompatible with the existence of proprietary right—that a zemindari was inheritable by usage and prescription, the force of which are admitted in all countries, when derived from principles of natural right and conformable to right reason—that the sanad was never conferred at discretion upon an alien to the exclusion of the heir and was properly construed as confirming existing rights, not as creating new ones—that it was only the principal zemindars who asked or received *sanads*—which the inferior zemindars succeeded according to their own laws of inheritance—that the use of the word *service* in the sanad proved nothing, when the tenure was found to be hereditary, and property depending upon *service* in its inception may have become by usage hereditary—that the *nazarana* paid on investiture was probably

1 Harrington's Analysis, Vol. III, 228.
2 H. p. 245.
3 H. 229.
4 Fifth Report, Vol. I, 101.
5 Fifth Report, Vol. I, 622.
6 Introduction, p. 33.

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an exaction or ought at any rate to be regarded as fine for the renewal of an estate—that the *krori* and *amil* both holding an office concerned with the collection of the revenue, paid no *nazarana*, and did not succeed by inheritance—that in a country subject to frequent revolutions in which the zemindar so often took part against the Government as with it the security for personal appearance was merely a device to keep them to their allegiance—that the sanad contained no term, and the obvious inference was that the tenure was to continue so long as the conditions of the grant were observed."

Mr. Harrington's definition of a zemindar.

The most accurate definition of a zemindar was, however, that which was given by Mr. Harrington in 1789:—"A landholder of a peculiar description not definable by any single term in our language—a receiver of the territorial revenue of the State from the raiyats and other under-tenants of land—allowed to succeed to his zemindari by inheritance, yet in general required to take out a renewal of his title from the Sovereign or his representative on payment of a *peshcush* or fine of investure to the Emperor, and a *nazarana* or present to his provincial delegate, the mazim,—permitted to transfer his zemindari by sale or gift—yet commonly expected to obtain previous special permission; privileged to be generally the annual contractor for the public revenue receivable from his zemindari—yet set aside with a limited provision in land or money, whenever it was the pleasure of Government to collect the rents by separate agency or to assign them temporarily, or permanently, by the grant of a *jagir* or *altamgha*—authorized in Bengal since the early part of the eighteenth century to apportion to the pergunnas, villages, and lesser divisions of land within his zemindari, the abwab or cesses imposed by the subadar, usually in some proportion to the standard assessment of the zemindari, established by Todar Mal and others; yet subject to the discretionary interference of public authority either to equalise the amount assessed on particular divisions or to abolish what appeared oppressive to the raiyat—entitled to any contingent emoluments proceeding from his contract during the period of his agreement; yet bound by the terms of his tenure to deliver in a faithful account of his receipts—responsible, by the same terms for keeping the peace within his jurisdiction; but apparently allowed to apprehend only and deliver over, to a Musulman magistrate for trial and punishment.[1]" Mr. Rouse adds to this:

Mr. Rouse.

"If the zemindari be even an office, and such office give possession of land which has by claim or custom descended from father to son or to collaterals, with other circumstances incidental to property, such as mortgage, alienation, bequest, or adoption, it is in reality a landed inheritance."

Todar Mal's assessment.

Any description of the land system of tha Mahomedan epoch would be defective without a short account of Rajah Todar Mal's assessment. He first made a measurement of the land, and in order to do this most effectively he adopted the *ilakaguz*[2] as the standard measure of length, and the *jureep* or *beegha* of sixty square *guz* as the standard measure of area. He then ascertained the produce of each beegah of land, and fixed the proportion payable to Government.[3] The

1 Harrington's Analysis, Vol. III, 395.

2 Ayeen Akbery, Vol. I, 351—355; Baillie's Land Tax, XXIX; Fifth Report, Vol. I, 239, 240.

3 Ayeen Akbery, Vol. I, 355—361; Elphinstone's History of India, 541—544; Fifth Report, Vol. II, 165; Baillies Land Tax, XXIX.

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land was distributed into four classes; *first*, *poole* or land which was cultivated for every harvest, and which did not require to lie fallow, paid the full demand every year; *second*, *porowty* or land which was allowed to lie fallow for a short time to recover its strength, was charged only when under cultivation; *third*, *chechur*, or land which had lain fallow for three or four years from excessive rain or inundation, paid two-fifths in the first year, three-fifths in the second year, four-fifths in the third and fourth years, and the full rate in the fifth year; *fourth*, *bunjer*, or land which had for the same cause lain fallow for five years or upwards, was assessed at still more favourable rates. The quantity of each kind of produce yielded by a beegah of each class was then ascertained; an average of the three was taken, and the Government demand was fixed at one-third of this average. Having fixed the Government share of the produce, Todar Mal next proceeded to lay down rules under which such share might be commuted for a money payment. The prices current for the nineteen years preceding the survey were obtained from every village, and the value of the produce was calculated according to an average of these prices. The rules for commutation were occasionally revised according to market rates. The settlement was, at first, made annually, but as this grew vexatious to the raiyats, and troublesome to the Government, the settlements were afterwards made for ten years, on an average of the preceding decennial period.

Comparative statement of annual revenue.

The annual amount of revenue assessed by the successive Governments upon Bengal during the Mahomedan period are interesting subjects for study. They are as follows:—

1582	...	Rs. 1,06,93,152	...	(Todar Mal).
1658	...	„ 1,31,15,907	...	(Shuja Khan).
1725	...	„ 1,42,88,186	...	(Jaffar Khan or Murshid Ali Khan).
1728	...	„ 1,42,45,561	...	(Sujahuddin).
1763	...	„ 2,56,24,223	...	(Kasim Ali).
1790-91	...	„ 2,68,00,989	...	(The first year of the Decennial Settlement).

It will be seen from the above that the Decennial Settlement was made at 2½ times the revenue that Akbar received in 1582.

The State share of the produce.

No general statement as to the proportion of produce taken by the Mahomedan State from the cultivation can be hazarded. Sir George Campbell says that the Government, before the British accession, took from one-fourth to half of the gross produce, one-third and two-fifths being the most common proportions.[1] The Fifth Report puts the State proportion at three-fifths in fully settled land, leaving the cultivators two-fifths.[2] Out of the three-fifths taken by the State, the zemindar and village officers had to be paid, such payment amounting theoretically to one-tenth. This deduction was to meet the whole cost of collection.[3] Mr. Shore gives two different opinions; his earlier opinion is that the Government took one-third,[4] but his latter opinion puts the Government share at from one-half to three-fifths.[5] Mr. Elphinstone says that one-third is moderate

1 Cobden Club Essay. 157.
2 Fifth Report, Vol. I, 18.
3 Fifth Report, Vol. I, 19, 362, 367.
4 Harrington's Analysis, Vol. III, 232 (note).
5 Fifth Report, Vol. I, 126, 599.

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assessment, and that the full share is one-half.[1] Mr. Grant says that the proportion taken was one-fourth, which he considers to be moderate.[2] In Behar many villages were assessed at half or even nine-sixteenths of the gross produce, paid in kind of the *buttai* principle.[3] On the whole, therefore, it must be said that the proportion taken by the Mahomedans was in later times very much greater than the moderate assessment of the Hindu times, and that the cultivators were left with the barest possible subsistence which the greed of rulers and zemindars was always eager to diminish. Under such circumstances the value of the raiyat's holding was scarcely appreciable, and the only valuable right was the right to receive the revenue. But in spite of this it can hardly be said that the Government had a right to fix its own share at option. The ordinary mode of enhancing the revenue was by imposing abwabs. Mr. Mill says:[4] "In India and other Asiatic communities similarly constituted the raiyats or peasant farmers are not regarded as tenants-at-will, nor even as tenants by virtue of a lease. In most villages there are indeed some raiyats on this precarious footing, consisting of those or the descendants of those who have settled in the place at a known and comparatively recent period; but all who are looked upon as descendants or representatives of the original inhabitants, and even many more tenants of ancient date, are thought entitled to retain their land as long as they pay the customary rents. What these customary rents are, or ought to be, has indeed in most cases become a matter of obscurity; usurpation, tyrany, and foreign conquest having to a great degree obliterated the evidences of them. But when an old and purely Hindu principality falls under the dominion of the British Government, or the management of its officers, and when the details of the revenue system come to be enquired into, it is usually found that, though the demands of the great landholder, the State, have been swelled by fiscal rapacity until all limit is practically lost sight of, it has yet been thought necessary to have a distinct name and a separate pretext for each increase of exaction; so that the demand has sometimes come to consist of thirty or forty different items into the nominal rent. This circuitous mode of increasing the payments assuredly would not have been resorted to, if there had been an acknowledged right in the landlord to increase the rent. Its adoption is a proof that there was once an effective limitation, a real customary rent; and that the understood right of the raiyat to the land, so long as he paid rent according to custom, was at some time or other more than nominal.'

Abwabs.

The following are the abwabs imposed by successive Governors in Bengal:—'

1. *Khasnavisi* imposed by Jaffir Khan.
2. *Nuzzerana Mokurari* } By Shujauddin.
3. *Zer Mahthut* }
4. *Mahthut* }
5. *Fouzdari* }
6. *Maharatta Chout* }
7. *Ahuk* } By Ali Verdi Khan.
8. *Nuzzerana Mansurgunge* }
9. *Serf ticca* ... By Kasim Ali.

Other numerous abwabs gradually came in. (See s. 74 *post*).

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1 History of India, 76.
2 Fifth Report, Vol. I, 274, 373.
3 Whinfield's Landlord and Tenant.
4 Political Economy, Bk. II, Chap. IV, 2, p. 148.

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The Permanent Settlement.

The result of the discussions about the status of the zemindar above referred to was the declaration of the Permanent Settlement. The conclusion that was arrived at, was that the zemindar is the proper person to be settled with. The rules for the Decennial Settlement of Bengal were first promulgated on the 16th February 1790, but the amended rules were passed on the 23rd November 1791, which notified that the assessment will "remain unalterable for ever, "if the Court of Directors approve of such continuance.[1] Their approval was expressed in their letter of the 19th September 1792, and the proclamation of the Permanency of the Settlement was made on the 22nd March 1793. That proclamation was embodied in Regulation I of 1793, in which year fifty-eight Regulations were passed on the same day.

The proclamation of the Permanent Settlement.

The proclamation is addressed to the "zemindars, independent talukdars, and other actual proprietors of land paying revenue to Government in the provinces of Bengal, Behar and Orissa."

"The Governor-General in Council declares to the zemindars, independent talukdars, and other actual proprietors of land, with or on behalf of whom a settlement has been concluded under the regulations above-mentioned, that at the expiration of the term of the settlement, no alteration will be made in the assessment which they have respectively engaged to pay, but that they, and their heirs and lawful successors, will be allowed to hold their estates at such assessment for ever.[2]

"It is well known to the zemindars, independent talukdars, and other actul proprietors of land, as well as to the inhabitants of Bengal, Behar, and Orissa in general, that from the earliest times, until the present period, the public assessment upon the lands has never been fixed, but that, according to established usage and custom, the rulers of these provinces have from time to time, demanded an increase of assessment, from the proprietors of land, and that for the purpose of obtaining this increase, not only frequent investigations have been made to ascertain the actual produce of their estates, but that it has been the practice to deprive them of the management of their lands, and either to let them in farm, or appoint officers on the part of Government to collect the assessment immediately from the raiyats. The Honourable Court of Directors, considering these usages and measures to be detrimental to the prosperity of the country, have, with a view to promote the future ease and happiness of the people, authorized the foregoing declarations; and the zemindars, independent talukdars, and other actual proprietors of land, with or on behalf of whom a settlement has been, or may be concluded, are to consider those orders fixing the amount of the assessment, as irrevocable, and not liable to alteration by any person whom the Court of Directors may hereafter appoint to the administration of their affairs in this country.

"The Governor-General in Council trusts that the proprietors of land sensible of the benefits conferred upon them by the public assessment being fixed for ever, will exert themselves in the cultivation of their lands, under the certainty that they will enjoy exclusively the fruits of their own good management and industry, and that no demand will ever be made upon them, or their heirs, or successors, by the present or any future Government, for an augmenta-

[1] Article 2. [2] Article 3.

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tion of the public assessment, in consequence of the improvement of their respective estate.[1]

Pledge of protection to raiyats.

To prevent any misconstruction of the foregoing articles, the Governor-General in Council made some other declarations, of which the first is: "It being the duty of the ruling power to protect all classes of people, and more particularly those who from situation are most helpless, the Governor-General in Council will, however, whenever he may deem it proper enact such regulations as he may think necessary for the protection and welfare of the dependant talukdars, raiyats and other cultivators of the soil, and no zemindar, independent talukdar, or other actual proprietor of land shall be entitled on this account to make any objection to the discharge of the fixed assessment, which they have respectively agreed to pay."[2]

Property in the soil as conferred by the Proclamation.

But it is finally "notified[3] to the zemindars, independent talukdars and other actual proprietors of land, that they are privileged to transfer to whomsoever they may think proper, by sale, or gift or otherwise, their *proprietary rights* in the whole or any portion of their respective estates without applying to Government for its sanction to the transfer; and that all such transfers will be held valid, provided that they be conformable to the Mahomedan or Hindu laws * * * *; and that they be not repugnant to any regulations now in force, which have been passed by the British administrators, or to any regulations that they may hereafter enact."

Language has no significance if this was not meant to convey property in soil to the zemindar.

Limitation of the proprietary right discussed.

The only limitations that the Government thought fit to impose upon the proprietary right conferred upon the zemindars were the restrictions mentioned in section 52 of Regulation VIII of 1793, and the reservation of the rights to legislate for the protection and welfare of the cultivators of the soil. The 52nd section of Regulation VIII of 1793 provides as follows: "The zemindar or other actual proprietor of land is *to let the remaining lands of his zemindari or estate*, under the prescribed restrictions in any manner he may think proper; but every engagement contracted with under-farmers shall be specific as to the amount and conditions of it, and all sums received by any actual proprietor of land or any farmer of land, of whatever description, over and above what is specified in the engagements of the persons paying the same, shall be considered as extorted and be repaid with a penalty of double the amount. The restrictions prescribed and referred to in this section are the following: "(1) That no person contracting with a zemindar or talukdar or employed by him in the management of the collections, shall be authorized to take charge thereof without an *amilnama* or written commission signed by the zemindar or talukdar:[4] (2) that the abwabs are to be revised in concert with raiyats and consolidated with the *assul* into one specific jumma;[5] (3) no new abwab or mahtut is to be imposed under any pretence[6] whatever; (4) where custom prevails of varying the potta, according to the kind of crop produced, a custom which is expected to decline, and while the parties prefer it, the engagement shall specify the quantity of land, the species of produce, the rate of rent, and its amount, and the term of the

[1] Article 6.
[2] Article 7.
[3] Article 8.
[4] Section 53.
[5] Section 54.
[6] Section 55.

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lease,[1] &c.; (5) the rents payable by the raiyats were to be specifically stated in the potta, which in every possible case was to contain the exact sum to be paid by them; when only the rate can be specified, as in cases where the rents are adjusted upon a measurement of the lands after cultivation, or on a survey of the crop, or when they are payable in kind, the rate and terms of payment and proportion of the crop to be delivered with every condition shall be clearly specified;[2] (6) that every zemindar and talukdar shall prepare a suitable form of potta and submit it to the Collector, who, after approval thereof, shall notify to the raiyats that such pottas may be obtained, and no other form of potta shall be allowed;[3] (7) as soon as the rent was ascertained and settled, a potta for the adjusted rent was to be prepared and tendered to each raiyat;[4] (8) all existing leases are to hold good, unless granted by collusion or without authority;[5] (9) no landholders or farmers shall cancell the pottas of the khudkasht raiyats, except on proof of their being obtained by collusion, or that the rents of the last three years were below the rates of the pergunna *nirckbundy* or that they have collusively obtained deductions from their rents; or upon a general measurement of the pergunna for the purpose of equalising and correcting the assessment.[6] The rule has no application to Behar, where rents in kind are usual; (10) time was to be allowed for the preparation and delivery of pottas to raiyats, and after the expiry of this time, claims not supported by pottas were to be non-suited;[7] (11) a patwari was to be established at every village who was to record the account of the raiyats;[8] (12) all persons receiving rents were to give receipts for dependent talukdars, under-farmers, raiyats and others for all sums paid by them and a receipt in full on the complete discharge of every obligation;[9] (13) the rents of raiyats who absconded on account of inundation, draught, or other calamity were not to be demanded from those who remained;[10] (14) the instalments of rent payable by the under-renters and raiyats were to be regulated according to the time of reaping and selling the produce.[11]"

Such are the restrictions prescribed by the Regulation, and to these must be added the restriction, that no proprietor should fix the jumma of any taluk for a term exceeding ten years, or let any lands in farm, or grant pottas to raiyats or other persons for the cultivation of lands for a term exceeding ten years,—which was imposed by Regulation XLIV of 1793. Subject to these restrictions the proprietors were authorized in 1793 to let in whatever manner, they thought proper, the remaining lands of their zemindari or estate; and this *letting* meant letting to raiyats, as otherwise, restrictions (2), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13) and (14) would have had no application. But what are the remaining lands? In order to determine them, we must examine the preceding portions of the Regulation. The first forty-seven sections lay down rules as to the persons with whom settlement should be made, as to the lands included in the settlement, and so on. Section 48 then provides: "The settlement having been concluded with the zemindars, independent talukdars and other actual proprietors of land, they are to enter into engagements with the several dependent talukdars continued under them respectively, and consequently paying revenue through them, for the same period as the term of their own engagement with Government, provided the talukdars will agree to

1 Section 56. 3 Section 58. 5 Section 60, cl. 1. 7 Section 61. 9 Section 63, cl. 1.
2 Section 57. 4 Section 59. 6 Section 60, cl. 2. 8 Section 62. 10 Section 68, cl. 2.
11 Section 64.

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such revenue, progressive or otherwise, as the zemindar or other actual proprietor of land may be entitled to demand from them." And section 49 prescribes rules for *mukuraridars* and *istemraridars* who had (1) held at a fixed rent for more than twelve years, or (2) contracted for payment at a fixed rent with the zemindar or actual proprietor, and declares that these two classes are not liable to be assessed with any increase, which obviously means increase of the *assul jamma*.[1] Section 50 declares that the second class of *mukuraridars* and *istemraridars* above spoken of, are not to be protected against Government if the zemindari be held khas or let in farm. Section 51 then lays down rules to prevent undue exactions from dependent talukdars *viz.*, that their rent could not be enhanced unless upon proof (1) of a special right by custom to increase; or (2) of a right depending upon the conditions of the grant; (3) that the talukdar, by receiving abatements, has subjected himself to increase, and that lands are capable of affording it. Then comes section 52:—"The zemindar or other actual proprietor is to let the remaining lands of his zemindari or estate, under prescribed restrictions, in whatever manner he may think proper." The remaining lands here spoken of must therefore be lands remaining over and above the lands held by the *mukuraridars*, *istemraridars*, and dependent talukdars, who are by specific provisions protected from increase of *jumma*. This is the only reasonable interpretation that can be put upon the section.[2]

The Permanent Settlement both for zemindar and raiyat.

The Permanent Settlement is spoken of as the Magna Charta of the landed aristocracy of Bengal and Behar. We go further and say that it is the Magna Charta of the peasantry too. "Never," wrote Lord Hastings in 1819, "was there any measure conceived in a purer spirit of generous humanity and disinterested justice than the plan for the Permanent Settlement to the Lower Provinces. It was worthy the soul of a Cornwallis: yet this truly benevolent purpose, fashioned with great care and deliberation, has to our painful knowledge subjected almost the whole of the lower classes throughout these provinces to most grievous oppression—an oppression, too, so guaranteed by our pledge that we are unable to relieve the sufferers." The latter portion of this remark is hardly just to Lord Cornwallis. "I understand the word 'permanency,'" he observes, "to extend to the *jumma* only, and not to the details of the settlement, for many regulations will certainly be hereafter necessary for the further security of the raiyats in particular, and even those talukdars who, to my concern, must still remain in some degree dependent on the zemindars, but these can only be made by Government occasionally, as abuses occur; and I will venture to assert that either now, or ten years hence, or at any given period, it is impossible for human wisdom and foresight to form any plan that will not require such attention and regulation. I cannot, however, admit that such regulations can in any degree affect the rights which it is now proposed to confirm to the zemindars. I will never allow that in any country Government can be said to invade the rights of a subject when they only require for the benefit of the State, that he shall accept a reasonable sum equivalent for the surrender of a real or supposed right which in his hands is detrimental to the general interest of the public, or when they prevent his committing cruel oppressions upon his neighbours or upon his own dependents."

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1 Section 57.

2 This argument was for the first time advanced by Mr. Field in his Digest of the Rent Law.

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The effects of the Permanent Settlement.

Let us now examine the effects of the Permanent Settlement. There were three parties whose relations had to be determined, *viz.*, the State, the zemindar and the cultivator. The relation between the State and the zemindar was fixed once for all by the Permanent Settlement. The State made over its proprietary right, as against the cultivators to the zemindar for a fixed contract sum, reserving its sovereign right of protecting them against oppression. The relation between the zemindar and the raiyat was understood to be that of a proprietor and a tenant, subject to some restrictions only as shown above.

The follwing propositions may, therefore, be taken as established :—

(1) The State had a customary right as proprietor of taking a specific share in the gross produce of the land. This right the East India Company relinquished for a fixed contract sum to the zemindars by the Permanent Settlement.[1]

(2) The zemindar was recognized as actual proprietor of the estate, and was entitled to let his lands to the subordinate holders on any terms he chose, subject to some restrictions.

(3) Those restrictions protected the raiyats existing at the time of the Permanent Settlement to a certain extent.

(4) The State had again the sovereign rights of protecting all classes of subjects against oppression. The right was expressly reserved to the State by the Permanent Settlement in reference to the cultivators of the soil.

(5) The State had also a sovereign right of taxing all classes of its subjects, including landholders and cultivators. This right was not given away by the Permanent Settlement, and it is upon this right that the Government supports the revival of the income-tax against zemindars.

(6) The Permanent Settlement made no rules except those "restrictions," for the regulation of the relation between the landlord and tenant.

(7) The Permanent Settlement did not mean to affect customary rights.

Post-Decennial-Settlement (1793-1859).

The period that followed the Permanent Settlement and preceded the legislation of 1859 is characterised by an anxious effort of the State to secure

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1 Lord William Bentinck, the Governor-General, wrote to the Court of Directors on the 26th September 1832: "There is no disputing the fact that in 1793, the British Government disclaimed for itself and in favour of the zemindars all claim to the rent of the land, in consideration of a fixed annual revenue, which the zemindars bound themselves to pay. The regulations of Government provided at the same time for the preservation of all rights, prescriptive and other, of all the cultivating classes. The raiyats were heretofore nominally the tenants of the State, but they became *de jure*, what they had long been *de facto*, the tenants of the zemindars, whose demand on them was thus acknowledged and legalised to the extent of the Government share of the gross produce of the soil, what that share, *i. e.*, what proportion it bore to the whole, never having been defined. But at the same time in fixing the revenue in perpetuity, the Government compromised no right but its own to the increased rent which would have accrued naturally from increased produce, enhanced prices, and the reclaiming of waste lands, and no act of the Government could be construed as legalizing a demand on the part of the zemindars of more than the proper land-rent, *i. e.*, the Government share of the produce; but at the same time all that the cultivating classes had a right to demand was that the proportion which the Governmen share should bear to the gross produce of the soil should be regulated on some fixed principle, which might always and easily be applied to. The rent realised by the zemindars would fluctuate more or less under such a principle."

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its own revenue. While stringent rules were enforced for the realisation of arrears of Government revenue against the zemindar, great facilities were offered to auction-purchasers at a revenue-sale to avoid incumbrances. The whole tendency of this period is conservative: Regulation XLIV of 1793[1] provided that an auction-purchaser was entitled to cancel all engagements which the former proprietor shall have contracted with dependent talukdars and raiyats whose lands may be situated in the estate sold, with some exceptions and similar provisions were enforced for the cancellation of the leases of subordinate tenants by Act XII of 1844 and Act I of 1845. Regulation VII of 1799 was another powerful engine in the hands of the zemindar for repressing the raiyats. Self-interest or severity of assessment led to numerous sales of estate after the Permanent Settlement, and nine-tenths of the lands were sold.[2] The operation of these sale laws was more or less destructive of subordinate interests, and the proprietary right conferred upon the zemindars by the Permanent Settlement gradually grew into an estate in the legal sense of the term of much greater dimensions than the English fee simple. Not only were all other estates ignored to create it, but by the device of the sale law, as often as Government revenue was not paid, all subordinate intersts created since the Permanent Settlement were annihilated, and the higher estate handed over to its new possessor free of incumbrances This will be apparent if we trace the history of the tenant down to Act X of 1859.

"The three essential questions that now occupy the public mind," says one of the legislators,[3] "are the three F's, *viz.*, fixity of rent, fixity of tenure and free sale." We have traced the original rights of the cultivator under these heads, and endeavoured to show how they stood in the early part of this Intorduction; it remains only to follow up the discourse down to Act X of 1859.

The correct theory.

First as to settlement of rent.—The problem of Indian rent cannot be doubted to be one of great intricacy. "To see this" says Sir Henry Maine,[4] "it need only be stated that the question is not one as to a custom in the true sense of the word; the fund out of which rent comes has not hitherto existed, and hence it has not been asserted on either side of the dispute that rent (as distinct from Government revenue) was paid for the use or occupation of land before the establishment of the British Empire or that if it was paid, it bore any relation to the competition value of cultivable soil. * * * But the question is what vestiges remain of ancient ideas as to the circumstances under which the highest obtainable rent should be demanded for the use of land? The most distinct ancient rule which I have discovered occurs in the first of the official volumes containing the version of the Ancient Laws of Ireland published by the Irish Government. 'The three rents,' it says, 'are rack-rent from a person of a strange tribe, a fair rent from one of the tribe, and the stipulated rent which is paid equally by the tribe, and the strange tribe' (Leuchus Mor., p. 159.) This very much expresses the conclusion on the subjcet which I have arrived at upon the less direct evidence derived from a variety of quarters. The Irish clan was apparently a group much more extensive and of much looser structure than the Eastern or Western village community; it appears even to have embraced persons who cannot be distinguished from

1 Section 5.

2 The evidence of Mr. Traut before the Select Committee of the House of Commons (1832), 2341, 2342, and of Mr. Holt Mackenzie, 2598.

3 Raja Shiv Prasad's Speech.

4 Village Communities, p. 180.

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slaves. Yet from none of these (apart from express agreement) could any rent be acquired, but a rent fair according to received ideas, or in other words, a customary rent, It was only when a person is totally unconnected with the clan by any of those fictions explaining its miscellaneous composition which were doubtless adopted by this (as by all other primitive groups) – when such a person came asking for leave to occupy land, that the best bargain could be made with him to which he could be got to submit."

The principle for settlement of rent inculcated in this dictum therefore consists of: (1) contract rent, which would apply equally to the same as well as a strange tribe; (2) customary rent, which would hold good to one of the same tribe; (3) competition or rack-rent for one of different tribe. Applying this maxim to the primitive group of the village we had contract rent both for *khudkasht* and *paikasht*; customary rent for *khudkasht* alone, and competition rent for paikasht; or coming to a later period we ought to have freedom of contract both for occupancy and non-occupancy-raiyat, customary or prevailing rate for the occupancy-raiyat, and competition rent for non-occupancy-raiyat; and we shall presently demonstrate that this is the rule which has been adopted consciously or unconsciously, in Indian Legislation throughout. The Rent Commissioners who have discussed the question at length, obesrved that rent can only be settled by custom, competition, or by law, and that inasmuch as on account of the disturbing element of the sale laws, custom has not settled rent, and inasmuch as the ruling power has a right to determine the rent payable by the raiyat to the zemindar, the Government ought to determine what share of produce should be fair for the former to recover from the latter. Now in this statement of the Commissioners, there is a confusion of ideas. In the first place, they seem to labour under an impression that settlement of rent means fixity to unchangeableness of rent; secondly, their argument amounts only to a reasoning in circle. When we ask what is the best possible theory of settlement of rent we mean what rent is fair and eqitable and if the Commissioners tell us in answer that the Government well tell us what is fair and equitable rent, our knowledge is not advanced one whit more than we possessed. But the Commissioners also say that the Government will consider that to be a fair share which will leave enough to the cultivator of the soil to enable him to carry on cultivation to live in reasonable comfort, and to participate to a reasonable extent in the progress and improving prosperity of his native land. These are certainly noble ideas, and a landholder having the true interest of his estate at heart will possibly fully adopt them to the letter. The question, however, does not rest there; both parties concede that the rent should be fair, that the cultivator should have a reasonable subsistence and comfort. The question resolves to this,— whether the fairness of a rent should go by the received notion and ideas of the public or the fiat of the Government, in other words, by the arbitray will of the Government or by custom; thirdly, the Government in the present case has, as a matter of fact, no right to determine the proportion of rent which the zemindar is to receive from his raiyat. If the Government had any right to determine the proportion of produce that it was to receive, that right has been made over to the zemindar for a contract sum. This is clear from the preamble of Regulation XIX of 1793 and the Proclamation. The preamble says: "By the ancient law of the country, the ruling power is entitled to a certain proportion of the produce of every bigha of land, demandable in money or kind according to local custom, unless it transfers its right thereto, for a term or in perpetuity or limits the public demand upon the whole of the lands belonging to an

The Rent Commissioners.

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individual, leaving him to appropriate to his own use the difference between the value of such proportion of the produce and the sum payable to the public, whilst he continues to discharge the latter;" and the Proclamation while fixing the public assessment trusts that "the proprietors of land sensible of the benefits conferred upon them by the public assessment being fixed for ever will exert themselves in the cultivation of their lands, under the certainty that they will *enjoy exlusively the fruits of their own* good management and industry."[1]

How the correct theory of rent has practically developed.

At the date of the Permanent Settlement there were two classes of actual raiyats in the land, the khudasht and the paikasht and a class *en posse*, who though then belonging to the rank of *paikasht*, might at any time grow into the other class. For the *khudkashts* then existing on the land, section 60 of Regulation VIII of 1793 provide that their pottas are not to be cancelled except "upon proof that they have been obtained by collusion, or that the rents paid by them within the last three years have been reduced below the rate of the *nirikbundi* of the pergunna, or that they have obtained collusive deductions, or upon a general measurement of the pergunna for equalising and correcting the assessment." This is then the first rule of settlement of rent that we find in the Regulations. The main principle underlying this provision is that the *khudkasht* raiyat then existing on the land was bound to pay rent at the pergunna *nirikbundi;* that is in fact the sole test of the maintenance of his potta. This is more clear in Regulation XLIV of 1793, section 5. The auction-purchaser could recover from raiyats and under-tenants whatever the former proprietor would have been entitled to demand according to the established usage and rates of the pergunna or district in which such lands may be situated. It ought to be recollected that at that time there being more demand for cultivators than for lands the *paikasht* used to pay a lower rent than the *khudkasht*. For the *khudkasht*, the Legislature provided the pergunna or customary rent to be the limit of rent. It was never the contemplation of the Legislature that this also should be the settler of the *paikasht*, because as shown in the early part of this dissertation their original position as tenants-at-will subjected them to contract rent and did not entitle them to claim customary rent. The *khuakasht* is a member or a brother of the village group, and for him therefore the ancient rule of customary rent ought to be the rate of rent. For *paikasht* or *khudkasht en posse*, section 52 Regulation VIII of 1793 provided that the zemindar could let his land to him in whatever manner he may think proper, thus leaving him entirely to contract rent. The Permanent Settlement, however, possibly did not mean to affect customary rights, and if by custom of the country a cultivator came to be recognized as a *khudkasht* raiyat, his rent would in many cases be determined by the customary rent. We may, therefore, assume that the Permanent Settlement Regulation accepted the old theory of rent, that the *khudkasht* was to pay the customary rent and the *paikasht* the contract rent. For the latter no limitation whatever was made, except the prohibition of abwabs, &c. It has been argued by competent authorities[2] that since the potta was to be submitted to the Collector[3], the zemindar's right of rent was subject to the revision of an officer of the Government. This point has been cleared by section 6 of

1 See *ante*.
2 Mr. O'Kinealy's Minute, pp. 136—438, Vol. 113.
3 Section 48 of Regulation VIII of 1879.

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Regulation IV of 1794, which provides that "the approbation of the Collector required to be obtained to pottas by section 58 of Regulation VIII of 1793 is to be considered to extend to the form only." The provisions about the cancillation of pottas if below the pergunna rates only show that they were the highest rent then obtainable from a *khudkasht*, and as the *paikashts* were till then paying a lower rent than his, that rule sufficed for both, it being unnecessary to provide for a limit of the rent of the *paikasht*.

It is singular that except in section 60 of Regulation VIII of 1793, the term *khudkasht* does not occur in any of the numerous Regulations that have been passed during 1793 to 1819. The only mention of it that we can trace after 1793 is in section 11 of Regulation VIII, 1819, where in protecting him against a purchaser at a patni sale, he is described as "resident and hereditary cultivator," which obviously implies a descent from an ancient tenant. The term "hereditary" seems here to be used not in the sense of *transmissible*, but of *transmitted*, by inheritance, conveying a sense of inherited rather than heritable right. Hence in 1822 we find that a distinction had grown between ancient *khudkasht* and new *khudkhasht*. Regulation XI of 1822, while giving to an auction-purchaser at a revenue-sale the advantage of cancelling the pottas of under-tenants, prescribes: "Nor shall the said rule be construed to authorize any purchaser as aforesaid to eject a *khudkasht kadimi* raiyat, or resident and hereditary cultivator having a prescriptive right of occupancy. Nor shall a purchaser demand a higher rate of rent from an under-tenant of either of the above descriptions, than was recoverable by the former malguzar, saving and except cases in which such under-tenants may have held their lands under engagements stipulating for a lower rate of rent than would have been justly demandable for the land, in consequence of abatements having been granted by the former malguzars from the old-established rates by special favour, or for a consideration or the like, or in cases in which it may be proved that alluding to the custom of the pergunna, mouzah, or other local division, such under-tenants are liable to be called upon for new assessment or other demand not interdicted by the Regulations of the Government." Observe that here only *kadimi khudkashts* are protected, but not *khudkashts* in general; and even with regard to the former the established customary rate was the only limitation of their rent. This distinction is more definitely traceable in 1841. Section 21 of Act XX of 1841 runs thus: "And it is hereby enacted that the purchaser of an estate sold under this Act, for the recovery of arrears due on account of the same, in the permanently settled districts of Bengal, Behar, Orissa and Benares, shall acquire the estate free from all encumbrances which may have been imposed upon it after the time of settlement, and shall be entitled, after notice given under section 10, Regulation V of 1812, to enhance at discretion (anything in the existing Regulations to the countrary notwithstanding) the rents of all under-tenure in the said estate, and to eject all tenants thereof with the following exceptions." And exception No. 3 "is land held by *khudkasht* or *kadimi* raiyats having rights of occupancy at fixed rents, or at rents assessable according to fixed rates under the Regulations in force." The words "enhance at discretion" in the section, and the disjunctive word "or" in the 3rd exception, are very significant. The disjunctive shows that in 1841 only those were recognized as *khudkasht* raiyats who were *kadimi* raiyats, while all the rest were not *khudkasht* and the purchaser could enhance their rents at discretion. The *kadimi khudkasht* could be assessed only according to the pergunna or customary rate.

The pergunna rate had, however, come into disuse as early as 1812. Mr. Colebrooke drew the attention of the Government to this fact.

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and suggested three rules of assessment: (1) the pergunna rate; (2) where such rate was not ascertainable, the rate or rates payable for other lands of similar description and of the same quantity in the vicinity; and (3) when the whole estate was to be assessed, the highest rate paid for the same lands in any one year within the period of three years last past. These rules were embodied in Regulation V of 1812, and the provisions about the notice of enhancement was first started in ss. 9 and 10 of the enactment. This Regulation also gave a great impetus to contracts and agreements between the parties.

Secondly as to ouster.—The Permanent Settlement made no express provisions for it; though the landlord having an option to let his land in any manner he thinks proper, might have stipulated a condition about forfeiture or ejectment; and if old custom had its play, the *paikasht* was liable to ejectment at will, and the *khudkasht* for non payment of rent. Indeed, there being more demand for cultivators than for land in those early times, it was not necessary to provide for rules of ejectment at all. The Sale Regulations, however, made express provisions for cancellation of pottas and ouster, and when we recollect the fact that nine-tenths of the estate were sold, we must assume that when a demand for land arose, the holders of the estates did not fail to take advantage of the sale provisions, and the contract right.

Thirdly as to transfer.—Of transfers of raiyati-holdings we have no trace. We have already shown that before the period of the British Government, alienability was not an incident of raiyati holding. The earlier Regulations seem to have adopted this view. It is not clear from clause 7, section 15 of Regulation VII of 1799 which speaks of "a lease-holder or other tenant having a right of occupancy only so long as a certain rent or a rent determinable on a certain principle according to local rates and usages be paid, without any right of property or *transferable possession*," whether the transferability refers to the raiyati holding. But section 33 of Regulation XI of 1822 provides: "Nothing in the said section (9 of Regulation V of 1812) was intended or shall be construed to affect the right of any individual possessing a *transferable or hereditary right* of occupancy to contest the justness of the demand so made;" we can infer from this that in some places a custom had grown making the *khudkasht* right transferable.

Act X of 1859, *Act VIII of* 1869, *B. C., and Act VIII of* 1885.

With the introduction of Act X of 1859 dawned a new era in the history of the landlord and tenant. It was in that year that the sale laws were settled by Act XI of 1859. That was the first Act by which the Government redeemed the pledge of protecting the raiyats that was given in the proclamation of the Permanent Settlement. It has, therefore, been styled the Raiyats' Magna Charta. It were better to call it the Confirmation.

At the time of the passing of Act X, two things required legislation: (1) it was doubted whether prescription or residence in the village should constitute a *khudkasht* raiyat. It was necessary to remove that doubt by positive legislation; (2) it was necessary to find out some definite rule for enhancing the customary money-rent.

The first of these problems was solved by the legislators of 1859 by abandoning the element of residence, and adopting a prescriptive test in determining the rights of the *khudkasht*. The period of prescription in the case of land has always been twelve years in India, and this had probably some influence in determining

The *khudkasht* revived.

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the period chosen. Act X of 1859, section 6, therefore provided that "every raiyat, who shall have cultivated or held land for a period of twelve years, shall have a right of occupancy in the land so cultivated or held by him, whether it be held under potta or not, so long as he pays the rent payable on account of the same; but this rule does not apply to khamar, *nij-jote*, or *sir* land belonging to the proprietor of the estate, and let by him on lease for a term, or year by year, by a raiyat not having a right of occupancy. The holding of the father or other person from whom a raiyat inherits shall be deemed to be the holding of the raiyat within the meaning of this section." This provision substantially restores the *khudkasht* raiyat to his former position, for probably in Hindoo and Mahomedan times a raiyat, who had cultivated the same holding for twelve years, would have been considered to have given the pledges required by the community for protection against ouster. It was also evidently following the principles of the ancient system that the *khamar nij jote*, and *sir* lands were excluded, such land being in the immediate occupancy or cultivation of the zemindar, or if not so, at least not occupied by the *khudkashts*. Sir Henry Maine observed:—

"There was too much around the earliest Anglo-Indian observers which seemed inconsistent with (to say the least) the universal occurrence in India of English relation between landlord and tenant-at-will for them to assume unhesitatingly that the absolute ownership of the soil was vested in some one class, and that the rest of the cultivating community were simply connected with the proprietary class by paying for the use of the land whatever the members of that class saw fit to demand. They did assume that the persons who were acknowledged to be entitled to have the highest rights in the soil, whether within the community or without it, bore a very close analogy to English land-owners in fee simple. They further took for granted that the great mass of the cultivators were tenant-at-will of the English pattern; but they gave effect to their doubts of the correctness of those analogies by creating between land-owner and tenants-at-will an intermediate class of 'protected,' or, as they are called in the East, 'occupancy tenants.' When, under the Government dispossessed by the British, any cultivator was shown to have held his land by himself or his ancestors for a certain space of time, he was declared to be entitled to a qualified protection against eviction and rack-rent. By a recent legislative enactment this principle has been generalised, and any cultivator who even under the British Government has been undisturbed by his landlord for the like period is invested, in some parts of India, with the same protection. But at first the rule, of which the origin is uncertain, was probably intended as a rough way of determining a class which in some sense or other was included within the village community. The exact period of occupation selected was twelve years, the longest time during which it seems to have been thought safe to carry back into native society an enquiry upon legal evidence into a question of fact."

The twelve years' occupancy-raiyat is a creation of Act X of 1859. The original division of raiyats was *paikasht* and *khudkasht*. Thus Mr Shore writes (Harrington's Analysis, p. 267): "There are two other distinctions of importance also with respect to the rights of the raiyats. Those who cultivate the lands of the village to which they belong either from length of occupancy or other cause, have stronger right than others, and may in some measure be considered as hereditary tenants and they generally pay the highest rents. The other class cultivate lands belonging to a village where they do not reside; they are considered tenants-at-will." The former are *khudkasht* raiyats and the latter *paikasht* raiyats. "At the time of the passing of Act X of 1859 then,"

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observed Mr. Justice Campbell, "the estate of things was this: the tenures and rents of the raiyats were still for the most part regulated by the old custom of former times. But two things specially required legal definition—

"*First.*—There was doubt as to the mode or prescription by which a *khudkasht* or occupancy tenure was acquired, and which tenures were of this character. It was not certain whether mere settlement in the village on the ordinary terms, without limitation of tenure, gave such a right, or what length of prescription established that right. The various sale laws had also introduced a large element of confusion—different estates being variously affected according to the date of sale. And, what is perhaps most important of all, owing to the absence of public records in Bengal, the perishable nature of private evidence, and the discredit attaching to private documents and oral evidence in this country, it was very difficult to prove whether a raiyat's holding was really ancient, or what was the date of its creation. The oldest holdings were imperilled by the absence of reliable proof.

"*Second.*—There was an entire want of any regulated and defined legal mode of enhancing the customary money rate."—B. L. R., F. B., 257.

In the same case Mr. Justice Steer expressed himself thus: "Great and undoubted, however, as the above concessions were in favour of the above always somewhat privileged class of raiyats, they were altogether eclipsed by those which the Act conferred on the next class of raiyats. That a right of occupancy was acquired by anything short of an occupation from a period prior to the Permanent Settlement,—an occupancy which entitled the raiyat to be called a *khudkasht* raiyat—has always been, I think, a matter of doubt. But no manner of doubt can be entertained that the twelve-year occupancy right was altogether unheard of before the Act suddenly conferred the right. What raiyats were entitled under the old laws to be called *khudkasht* raiyats, and what raiyats were entitled to be considered as raiyats who had acquired a prescriptive right of occupancy are subjects which, I think, have never been cleared up either by the express authority of law, or by the authority of any judicial ruling. Are *khudkasht* raiyats then, as spoken of in the Regulations, those and exclusively those, were *khudkasht* at the time of the Permanent Settlement; or does the term, *khudkasht* embrace also those raiyats who, since the time of the Permanent Settlement, had by a long residence in the village, in which they held and cultivated land, acquired a prescriptive right of occupancy? These were, I think, even up to the passing of Act X moot questions and are so still. While no doubt exists as to the right of those raiyats, who, from generation to generation have cultivated the lands of the village in which they reside for a period antecedent to the Permanent Settlement, and who without any doubt are entitled to be called and classed with *khudkasht* raiyats, the greatest doubt exists as to whether any other class or description of raiyats are entitled to be called *khudkasht* raiyats. If any raiyat, whose tenure came into existence since the Permanent Settlement, can any means be called *khudkasht* raiyat at all, it certainly is not the raiyat lives who simply sin the village and cultivates the land of the village. To be a *khudkasht* raiyat at all implies that the raiyat must not only be a cultivator of lands belonging to the village in which he resides, but he must be an hereditary husbandman. A *khudkasht* right is not acquired in a day, but is transmitted; and it has never, so far as my knowledge extends, been laid down what exact length of holding gives a title to a tenant to consider himself a *khudkasht* raiyat. Certainly, the old Regulations seem to point to other than those undoubted *khudkasht* raiyats whom the Permanent Settlement found upon the land; but

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what length of holding constituted a right by prescription has never been definitely or inflexibly laid down. If decisions are to be found in which a prescriptive right was deemed established by an occupation short of the Permanent Settlement, there are, on the other hand, plenty of decisions to show that length of occupancy was not deemed to entitle the tenant to be considered anything better than a tenant-at-will. If any other but the ancient raiyat occupying from generation to generation had the right of occupancy, no others had it; and therefore in a vast majority of cases Act X, by the twelve-year rule of occupancy, has created rights which never existed before."

Mr. Justice Trevor who led the majority of the Judges in the Great Rent Case said: "At the time of the Decennial Settlement the raiyats were in Bengal, as in other parts of India, divided into *khudkasht* or resident, and *paikasht* or non-resident. It has indeed been contended before us that time is of the essence of a *khudkasht* tenure; that a raiyat simply residing in a village in which his land is, is not a *khudkasht* raiyat; and that, in order to constitute a *khudkasht* raiyat under the Regulations, he must be a resident hereditary raiyat, and that, if he has not succeeded by right of heirship, he does not fall within that class of tenants. But it appears to me that, whether we look to the etymology of the word or to the thing itself, there is no reasonable ground for question. *khudkasht* raiyats are simply cultivators of the lands of their own village who, after being once admitted into the village, have a right of occupancy so long as they pay the customary rents, and therefore with a tendency to become hereditary and with an interest in the produce of the soil over and above the mere wages of labour and the profits of stock; in other words, above the cost of production. These tenants seem at the Settlement, practically and legally, though no by express statute, to have been divided into two classes – the *khudkasht kadimi* and the simply *khudkasht*, or those who had been in possession of the land for more than twelve years before the Settlement, and those whose possession did not run back so long. Both by the Hindoo and Mahomedan law, as well as by the legal practice of the country, twelve years had been considered sufficient to establish a right by negative prescription, that is, by the absence of any claim on the part of other persons during that period; and hence the doctrine which has obtained that *khudkasht* raiyats in possession twelve years before the Settlement were under no circumstances, not even on a sale for arrears of revenue, liable either to enhancement of rent or eviction from their holding, so long as they paid the rents which they had all along paid. But when Regulation XI of 1822 was passed, the use in section 32 of that law of the terms *khudkasht kadimi* raiyat, or resident and hereditary raiyat with a prescriptive right of occupancy, to designate the cultivator, who would not be liable to eviction on a sale for arrears of revenue, gave rise to the doctrine that *khudkasht* raiyats, who had their origin subsequent to the Settlement were liable to eviction, though if not evicted, they under section 33 could only be called upon to pay rents determined according to the law and usage of the country; and also that the possession of all raiyats whose title commenced subsequent to the Settlement was simply a permissive one, that is, one retained with the consent of the landlord. Again, by Act XII of 1841 and Act I of 1845 (which repealed the former), a purchaser acquired his estate free of all encumbrances which had been imposed on it after the time of the Settlement, and he was entitled, after notice given under section 10 of Regulation V of 1812, to enhance at discretion anything in the Regulations to the contrary notwithstanding, the rents of all under-tenures in the said estate, and to eject all under-tenants, with certain exceptions, amongst which are *khudkasht kadimi*, but not simple *khudkasht*

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raiyats. It follows that these laws distinctly gave the purchaser the power to eject a *khudkasht* raiyat whose tenure was created after the Permanent Settlement, and if not ejected, they were liable to be assessed at the discretion of the landlord. This word 'discretion' entirely annihilated the rights of the *khudkasht* tenants created subsequent to the Settlement in estates sold under these laws. It reduced them from tenants with rights of occupancy, so long as they paid the established rate of the pergunna, or the rate which similar lands paid in the places adjacent, into mere tenants-at-will of the zemindar, who might any year eject them and place in their stead any tenant competing for the land. It is in short introducing into this countrary competition in the place of customary rent." (B. L. R., F. B., 214, 215 and 219).

Sir Barnes Peacock took a more decided view. He said: "I do not believe that even before the Permanent Settlement, every cultivator who resided in the village in which his lands were situate, whether let into possession for a term or only as a tenant-at-will, or to hold from year to year, necessarily became a *khudkasht* raiyat. The definition of *khudkasht* in Wilson's Glossary (287) is 'a cultivator of his own hereditary land.' The words *khud*, self or own, and *kasht*, to sow, show that the term has reference to some proprietary rights, rather than to the fact of residence in the village. In column 267 of the same Glossary *tit-khudkasht*, the definition is 'a resident cultivator—one cultivating, his own hereditary lands, either under a zemindar or a co-parcener in a village.' In Bengal one class of them holding their lands at fixed rates by hereditary rights sometimes sub-let them, except the part about their dwelling, in which they continue to reside, and although ceasing to cultivate and engaged in trade or business they retain their designations of *khudkasht*. The term is also applied in the North-Western Provinces to lands which the proprietor or the payer of the Government revenue cultivates himself. A *khudkasht* raiyat probably derived his title by descent from or succession to one of the old village community, or some person who in ancient times had acquired a proprietary right in the land under the old Hindoo or Mahomedan law by reason of his having reclaimed it. Menu says: "Sages pronounce cultivated land to be the property of him who cut away the wood, or who cleared and tilled it' (Chapter IX, para. 44). So property in waste land was, according to the Mahomedan law, established by reclaiming it with the permission of the Imam according to Aboo Hanifa, and by the mere act of reclaiming it according to Aboo Yusof and Mahomed. (See Baillie on the Land Tax of India, Chapter VI, para. 422). But however this may be, it is clear that since Regulation II of 1793, by which the right of property was declared to be vested in the landlords, *i e*, in the zemindars and independent talukdars, property in land which formed part of a permanently-settled estate could not be acquired by reclaiming from waste. How then could it be acquired except by contract or adverse possession, or by prescription going back as far as to the time of the Permanent Settlement? I am of opinion that neither a right of proprietorship nor a right of occupancy could have been acquired by any other means in a permanently-settled estate. The directions to revenue officers, paragraph 130, show that the right depends upon prescription. It is there said: 'It is impossible to lay down any fixed rule defining what classes of cultivators are to be considered entitled to hold at fixed rates. They are known in different parts of the country by different names, as *chupperbund*, *khudkasht kadimi*, *mourasi hukdar*, &c., all of which terms imply attachment to the soil or prescriptive right. Those who have no such right are commonly called *kutcha asamis*, *or paikashts*. It has sometimes been supposed that all raiyats resident in the village (*khudkasht*) are of the former class, and that those who reside in

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in another village (*paikasht*) have no rights. But there are frequent exceptions to this rule. Many cultivators residing in the village are mere tenants-at-will whilst those residing in neighbouring villages may have marked and recognized rights. Prescription is the best rule to follow. I am clearly of opinion that a raiyat who, after the date of the Permanent Settlement, and specially after Regulation V of 1812, was let into possession by a zemindar to hold as tenant for a fixed term, or at will, or from year to year, or without defining the period during which his tenancy was to continue, did not before Act X of 1859, merely by reason of an occupation for twelve years, become a *khudkasht* raiyat." (B. L. R., F. B., 318-320).

Thus very great doubt and difference of opinion have prevailed amongst the highest authorities as to the mode in which *khudkasht* raiyats were created in more modern days, and as Mr. Justice Campbell observed, one of the main purposes for which Act X was enacted was to settle this. Regulation I of 1793, section 8, clause 1, had expressly reserved to the Governor-General the right to make such Regulations as might be necessary to protect the cultivators. This was at length acted upon in 1859, when by Act X of that year a new species of right, called an occupancy right, was conferred upon cultivators who had occupied their holdings for twelve years and upwards Hence it has been observed that the occupancy raiyat is a creation of Act X of 1859. It has however substantially restored the *khudkasht* raiyat to his former position, and besides has extended his privileges to *paikasht* raiyats holding for twelve years. "Some of the strongest arguments," wrote Mr. Field in 1875, "urged against the provisions of Act X of 1859 were that while ignoring the special privileges of *khudkasht* raiyats and the existence of all rights depending upon custom, it conferred the same benefit upon *khudkasht* raiyats who admittedly had privileges, and *paikasht* raiyats who admittedly had none; and by giving an *ex post facto* operation to the right of occupancy provisions in respect of both classes, it did not allow the landlords time to provide by contract against the acquisition by the latter class of a right to which they had not a shadow of claim before. In the case of *khudkasht* raiyats the Legislature, in giving a right of occupancy, merely followed custom, the particular period of twelve years being borrowed from the law of limitation." (Field's *Regulation*, Introduction, p, 40, foot-note).

When, however, the revision of the Rent Law of Bengal in a comprehensive scale occurred to the Government, and a Commission was appointed for the purpose in 1879, Mr. Mackenzie, one of the members, raised the question whether the original *khudkasht* raiyat has not suffered by section 6 of Act X of 1859, and whether it would not be advisable to restore him *statu quo*. "Act X of 1859," he writes in his note of 6th January 1880, "was not intended by its authors to effect any radical change in the rights and status of the cultivating classes. * * It is clear that the intention of the Select Committee was not to change, but to elucidate the law and make it more precise; but it is now acknowledged that the effect of these sections in Bengal has been to inflict serious injury on resident raiyats, placing them in the position of tenants-at-will in respect of all lands as to which they cannot prove twelve years continued occupancy. This injury was not foreseen and was not intended. It appears to me to be the duty of this Commission to endeavour to give effect now to the intentions of the authors of Act X, and to restore, as far as is now possible, the provisions of the old law. I have already admitted that it is perhaps in the present day impossible and useless to attempt to rehabilitate the *khudkasht* or resident raiyat *totidem verbis*; and I have said that I think we must be content to adopt now a prescriptive test of residence. But holding as I distinctly do that long time was not of

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the essence of the ordinary *khudkasht's* title, I would make the term of prescription necessary to entitle a raiyat to the occupancy rights, of the old *khudkasht* a reasonably short one, just long enough in fact to give reasonable evidence of his intention to cultivate permanently the lands he rents. I have suggested that three years in a sufficiently long term to raise this presumption of intention to settle, and should entitle any raiyat to a right of occupancy, not of course in *khamar utbundi* or similar lands, but in the ordinary village jote land." Mr. Field, another member, opposed him. "The experience of the past," he observed, "is strong to show that if, for the classification of raiyats in the existing law, a new classification be now substituted, the result will be a fresh crop of litigation—a fresh period of disturbed and uncertain ideas as to rights. *Khudkasht* raiyats were the only raiyats privileged and protected up to the passing of Act X of 1859. Two elements went to make up a *khudkasht*—(1) residence in the village; (2) occupation of land forming part of the village. Act X dispensed with the former, and settled the unsettled ideas as to the latter by fixing a twelve-year period of prescription. It is not said in the interest of the raiyats that (1) this change in the law has prejudiced them as a body; (2) that we ought to restore the law to *status in quo*, ante Act X." After quoting several authorities to show that difference of opinion exists as to the mode in which *khudkasht* raiyats were created in the later days, he continues: "I think that the law on this point before Act X was most uncertain, and that the task of restoring that law is now almost an impossible one. The Village Community, if it ever existed in Lower Bengal, has long been broken up, and the definition of a village would raise insuperable difficulties. Doubtless this was felt by the framers of Act X of 1859, and influenced them to abandon the element 'residence in village.' The effect of this was to extend privilege and protection to the *paikashts*, and the selection of twelve years as the necessary period of prescription for occupancy did not of itself cut down the rights of any *khudkasht*; but although Act X did not expressly interfere with any customs not clashing with its provisions, people came to consider this Act to be a complete Code, and litigants in consequence made no effort to give evidence of customs. This and not any inability to prove continued occupancy for twelve years (as supposed by Mr. Mackenzie) I believe to be the measure of the mischief done by Act X. Our new Bill proposes to save such customs expressly, and this being so, the classification of Act X can no longer be said to cut down the rights and benefits of the raiyats as a body. This classification has now been established for twenty years. Change—specially change in the boundaries of established rights—is not advisable; and in the above view of the whole matter, the substitution of a fresh classification of rights is to my mind not expedient. That any considerable number of the cultivating class will be benefited by such a change has not been argued, and would, I think, be very difficult, if not impossible, to prove. The small portion in whose interest the change is proposed have not asked for it, nor have mofussil officers or other persons asked it on their behalf; and I am afraid that the benefit intended for the raiyats as a class will be more than neutralised by the disturbance of ideas and by the litigation that will inevitably ensue by the unwillingness of the zemindars to accept what they regard as a further encroachment on their rights—and by the lessened estimation and diminished actual value that will necessarily be attached to a right of occupancy when any squatter can acquire it in the short space of three years. (*The Report of the Rent Commission, Vol. II, Appendix, pp. 386 and 389,*) Mr. Field's views ultimately prevailed.

Section 6 of Act X of 1859, however, brought in a radical change in the economy and construction of the peasantry of Bengal. For the old distinction of raiyats into *khudkasht* and *paikasht*, we had now the broad division of raiyats

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having a right of occupancy and those having no such right, or occupancy raiyats and tenants-at-will. The Bengal Tenancy Act has re-introduced the element of residence in the village [see section 20), has given the occupancy raiyat an option to change lands in the same village [see section 20 (2)] and following the old custom has given him a right to hold fresh land in the village on the same tenure as the old (section 29), and has made his right heritable (section 26). He is not liable to ejectment (section 25), and that even if he defaults to pay rent (section 65)—which, however, is a provision that goes beyond his ancient rights.

Enhancement.

As to enhancement, the authors of Act X of 1859 at first proposed two rules 1st, the prevailing rate payable by the same class of raiyats; 2nd, increase of rent for increase of area. But before the Act was passed, another very equitable rule was introduced *viz.*, the increase of the value of produce, or of productive power of land (see pp. 145, 167—175), and all these rules were limited by another condition which was that the rent should be fair and equitable. The first of these rules it ought to be observed, is no other than the old customary rent (see pp. 72 74, 163—165 175—176, *post*). These rules have been substantially reproduced in the Bengal Tenancy Act (sections 30—39), only the third has been removed from the grounds of enhancement and restored in section 52 of the Act, and the second has been developed (sections 30, 32, 38, 39).

Ouster.

Act X of 1859 subjected the tenant-at-will to the terms of his landlord, and if he refused those terms he could be ousted (see p. 195, *post*). The occupancy raiyat as all other tenants was liable to ejectment for default of payment of rent (p. 265, *post*.) The Bengal Tenancy Act protected the non-occupancy raiyat by several conditions (see sections 44, 47, p. 197, 212, *post*), and the occupancy raiyat at fixed rate, and the permanent tenure-holder, are no longer liable to ejectment even for arrears of rent. Here the occupancy raiyat gets an advantage over his predecessor, the *khudkasht*.

Transfers

The statutory right of occupancy, which is a creation of Act X of 1859, was not transferable *ipso facto*. (See pp. 123—133, *post*.) But where there was a custom which allowed a transfer of occupancy holdings in spite of the landlord, that custom was maintained. When the Bengal Tenancy Act was in the anvil, it was proposed to give a statutory transferable character to the occupancy raiyat. That proposal has, however, been abandoned. But where it is transferable by custom, such custom has been recognised [cl, (*d*) of sub-section (3), s. 178 (p. 516 *post*) and illustration of sections 183 (p. 393, *post*)].

In the language of His Excellency the Governor-General and the Hon'ble Kristo Das Pal, we may conclude that the Bengal Tenancy Act is both a restoration and redistribution of property.

The following extract from the Bengal Supplementary Administration Report 1882-87, pp. 94 to 99 give the circumstances which led to the passing of the present Act VIII of 1885.

"When Sir Rivers Thompson assumed the administration of Bengal in April, 1882, the question of the amendment of the Rent Law in the Lower Provinces, which had for nearly ten years been the subject of agitation and discussion, had reached a stage at which it was certain that some legislative measure would be introduced, though the nature of that measure had not yet been finally determined. The necessity for legislation had, indeed, been apparent ever since the occurrence, in 1873, of the serious agricultural disturbances in Pabna. The Bihar famine of

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the following year diverted the attention of the Government to more pressing duties, but the report of the Famine Commission dwelt strongly on the necessity of placing the relations of landlord and tenant in Bengal upon a surer basis. The Agrarian Disputes Act of 1876 was passed by Sir R. Temple's Government as a temporary measure to meet emergencies like those of 1873, pending the fuller consideration of the whole question. A Bill dealing with the principles upon which rents should be fixed was prepared in 1876, but was not further proceeded with, and in 1878 the Government of Bengal proposed a measure intended to provide only for the more speedy realisation of arrears of rent. This Bill was introduced into the Bengal Council but it was found impracticable to confine it to the limited object indicated by its original title. The Select Committee on the Bill recommended that the whole question of a revision of the rent law should be taken in hand, and in April, 1879, the Government of India sanctioned the appointment of a Commission to prepare a digest of the existing law and to draw up a consolidating enactment. Proposals which had been separately made for amending the rent law in Bihar were also referred to the Commssion for consideration.

The report and draft Bill of the Commission were presented in July, 1880, and after the whole question had been further considered, the matured proposals of Sir Ashley Eden's Government were submitted to the Government of India in July, 1881. In March, 1882, these papers were forwarded by the Government of India to the Secretary of State, with an important despatch, in which the history of the question was reviewed and the views of the Governor-General in Council, of which Sir Rivers Thompson was a member, were fully explained.

"Such was the position of affairs when Sir Rivers Thompson became Lieutenant-Governor of Bengal. The reply of the Secretary of State was received in September, 1882. His Lordship, while concurring in the view that legislation was necessary, and while accepting the majority of the recommendations made by the Government of India, demurred to a proposal which formed a prominent feature of the despatch. The Rent Commission had desired to maintain thet existing rule by which the occupancy-right was acquired by twevle years' continuous possession. The Government of Sir Ashley Eden had recommended that the occupancy-right should be enjoyed by all resident *raiyats*. But the Government of India proposed to take the classification of lands instead of the status of the tenant as the basis on which the recognition of the occupancy-right should be effected, and to attach the right to all *raiyati* lands. It appeared to the Secretary of State that this involved a great and uncalled for departure from both the ancient custom and the existing law of the country, and he declined to sanction it. The Government of India defended their proposals in a subsequent despatch written in October, 1882, but the Secretary of State adhered to his former opinion, though he expressed his willingness to assent to the introduction of the Bill in the form which the Government of India preferred. The Government of India, however, declined to introduce a Bill in a form of which the Secretary of State disapproved, and it was determined that the measure should be framed upon the lines suggested in the Secretary of State's despatch.

"A revised draft of the Bill was prepared in the Legislative Department of the Government of India, and on the 2nd March, 1813, Mr. Ilbert moved in Council for leave to introduce it. On the 12th March Sir Steuart Bayley, in whose charge the Bill had been placed, moved that it should be referred to a Select Committee. After a long debate, extending over two days, the Bill was referred

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to a Select Committee... The meetings of the Committee commenced in November, 1884, and were carried on till the following March, when the Committee presented a preliminary report accompained by a revised draft of the Bill. Four members of the Select Committee recorded minutes of dissent from the report.

"The revised Bill was republished, and was subjected to a careful examination by divisional conferences of the executive officers of Government, as well as by judicial officers and by the non-official public. When these opinions had been received and considered, the views of the Government of Bengal were submitted to the Government of India in a letter dated the 15th September 1884..... Among other points of less importance, Sir River Thompson proposed to allow the free transfer of occupancy holding in Bengal, giving the landlord, however, a veto if the transfer were to any but an agriculturist; to leave such transfers in Bihar to be regulated by custom; to omit the clauses of the Bill which gave the landlord a right of pre-emption; to abandon the provisions for enhancement on the grounds of the prevailing rate, or of the increased productive powers of the land; to withdraw all limitations upon enhancement by suit, but no maintain them in cases of enhancement by contract; to restore the check which limited enhancements to a certain proportion of the gross produce; to provide that tables of rates should be prepared only on the application of parties; to retain substantially the existing law of distraint; and to provide for a cadastral survey and the preparation of a record of rights.

"The Select Committee resumed its sittings in November, 1884, and early in the following year it presented its final report, which was accompained by minutes of dissent from several members of the Committee. The debate, however, which followed, showed that the great majority of the dissentients fully accepted the principles of the Bill, though they thought some of its provisions unsatisfactory or incomplete.

"On the 27th February, 1885, the Bill was brought forward in Council by Sir Steuart Bayley, who moved that the report of the Select Committe should be taken into consideration. To this an amendment was moved that the Bill should be republished before being further proceeded with. After an exhaustive debate, which extended over two days, and in which the principles of the Bill were fully discussed, the amendment was rejected by a large majority. The Council then proceeded to discuss the clauses to the Bill. Above 200 amendments were placed upon the notice paper; but many of these were formally withdrawn, or were tacitly dropped. Upon all the important provisions, however of the Bill, there was an animated debate, which extended over the 4th, 5th, 6th, 9th and 11th of March. During this discussion it was the object of the Government of Bengal, while resisting those amendments which subverted or weakened the principles which the Bill was intended to establish, to strengthen the position of the occupancy *raiyats* by extending the right to the *parganna* instead of confining it to the village; to modify the rule of enhancement on the ground of the prevailing rate; and to give the non-occupancy *raiyat* the security of a five years' initial lease. These amendments were not accepted by the Council, but the Government of Bengal was successful in maintaining, against strong opposition, a limitation upon the enhancement of an occupancy *raiyat's* rent by private contract. The Bill was passed by the Council on the 11th March; it received the assent of the Governor-General on the 14th, and became law as Act VIII of 1885. The Act came into force on the 1st November following, except the chapter relating to distraint and to deposit of rent, the operation of which was postponed to the 1st February, 1886, to enable the High Court to frame the necessary rules.

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"The Bill which thus became law differed in some important particulars from the measure which had been introduced into Council two years before. Perhaps no legislative enactment was ever subjected to fuller examination, or to more searching criticism. The question had engaged the attention of the Government and the public for more than ten years; the Select Committee, which included members holding the most diverse views, held no less than 64 meetings, and had before it several hundreds of reports, opinions, and memorials. The result was that the Bill which finally commended itself to the approval of the Council was in some respects a compromise, and, if it was less thorough and complete, was certainly a more pratical and workable law than the draft which was originally laid before the Council. Some of the more important modifications which were introduced may be briefly noticed here. The Bill as originally brought in embodied the provisions for the sale of *patni taluks*; but it was eventually determined to leave Regulation VIII of 1819 untouched. The settled *raiyat* acquired by the original Bill an occupancy-right in all land held by him in the village or estate. The Act limited this to land in the same village. The occupancy *raiyat* was empowered to transfer his holding, subject to a right of pre-emption by the landlord at a price to be fixed by the Civil Court. The pre-emption clauses were struck out, and the power of transfer was left to be regulated by local custom. The rent of an occupancy *raiyat* could not be enhanced, under the Bill, to an amount exceeding one-fifth of the gross produce, nor that of a non-occupancy *raiyat* to an amount exceeding five-sixteenths: but no limitation of this kind finds a place in the Act. In suits for enhancement the Bill provided that no increase of demand in excess of double the old rent should be awarded: but there is no corresponding provision in the Act. A prominent feature of the Bill was the preparation of tables of rates, by which lands were to be classified according to the capabilities of the soil, and rent rates were to be fixed, which should be in force for not less than 10, or more than 30 years: but his Chapter was entirely struck out. The Bill provided that the non-occupancy *raiyat*, if he were ejeted from his holding, should receive compensation for disturbance: but no such stipulation will be found in the Act.

"The only material point in which the Bill was modified in the opposite direction was in the echancement of an occupancy *raiyats*, rent by contract out of court. The Bill allowed such enhancements to the amount of six annas in the rupee upon the old rent: but the Act reduced this to two annas in the rupee the Government of Bengal being strongly impressed with the danger of allowing pressure to be put upon tenants to enter into contracts which would virtually defeat the object of the legislature.

"The Bengal Tenancy Act, perhaps the most important measure which has passed into law since the Regulations of 1793 were promulgated, will be found on examination to have had three main objects in view, to one or other of which almost all of its sections can be referred. The ancient agricultural law of Bengal was founded on a system of fixity of tenure at customary rents. But this system was gradually ceasing to be suited to the altered econmic conditions of the country, and the attempts which were made to solve the question by the substitution of positive law for customary usage had hitherto been unsuccessful, In some parts of Bengal, in which the *zamindars* were powerful, the *raiyat* was treated as a mere tenant-at-will: in other parts, in which the population was comparatively sparse, the *raiyat* refused to pay any rent unless the *zamindar* agreed to his terms. Act X of 1859 rather added to the difficulty than removed it. On the one hand, this Act made it almost impossible for the *raiyat* to establish a right of occupancy: on the other hand, it placed insuperable obstacles

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in the way of the *zamindar* who sued for an enhancement of his rent. The courts of law, with rigid impartiality, required the *raiyat* to establish his occupancy right by showing that he had cultivated the same plot of ground for twelve successive years, and demanded from the landlord the impossible proof that the value of the produce had increased in the same proportion in which he asked that his rent should be enhanced. The legal maxim *semper presumitur pro-negante* was never more copiously illustrated than in the various phases of this rent litigation. The party upon whom lay the burden of proof was almost certain to fail. To this evil the Tenancy Act was intended to afford a remedy. The principle of the Act may be said to be based upon a system of fixity of tenure at judicial rents: and its three main objects are,—first, to give the settled raiyat the same security in his holding as he enjoyed under the old customary law; secondly, to ensure to the landlord a fair share of the increased value of the produce of the soil: and, thirdly, to lay down rules by which all disputed questions between landlord and tenant can be reduced to simple issues and decided upon equitable principles. A good example of the first will be found in the clause which throws upon the landlord the onus of disproving the *raiyat's* claim to a right of occupancy; the second is illustrated by the section relating to price-lists, which relieves the zemindar of the trouble of showing that the value of the produce has increased; the third pervades the whole of the Act, and is especially conspicuous in the valuable section which authorises an application to determine the incidents of a tenancy, and in the chapter which relates to records-of-right and settlements of rents. The maintenance of the principles of the Act is further safegaurded by a section which restricts the power of entering into contracts in contravention of its fundamental provisions.

"In pursuance of these main principles, the Act lays down rules to guide the courts in determining whether a tenant is a tenure-holder or a *raiyat;* it provides a procedure for the registration of the transfer of tenures; it defines the position of raiyats who hold at fixed rates of rent; it simplifies and facilitates suits for the enhancement or reduction of rent; it establishes a system for the commutation of rents payable in kind: it specifies the grounds on which a non-occupancy *raiyat* may be ejected; it prescribes rules for instalments, receipts, and interest upon arrears; it encourages the making of improvements; it restricts sub-letting; it provides for cases in which holdings are surrendered or abandoned, it protects the interests, both of the parties and of the general public, in cases of disputes between co-sharers; it lays down a procedure for recording the private lands of proprietors; it introduces a new system of distraint; and it gives protection to sub-tenants when the interest of the superior holder is relinquished or sold in execution of a decree.

Principal changes made by the Bengal Tenancy Act in the previous law.

"The principal changes made by the Bengal Tenancy Act in the previous law have thus been summed up in the Bengal Administration Report 1892 1893 pp. 92 and 93.

(1) A *raiyat* becomes a "settled *raiyat*" and acquires rights of occupancy in all the lands he holds in a village, provided he has held any land for twelve years in the same village. It is not now necessary that he should have held the same particular land, or that he should have held all the land for twelve years, as was the case before. If he has held any land for twelve years in a village, he acquires occupancy-rights in all the land he holds, or may in the future hold, in that village.

(2) In any proceeding between a raiyat and his landlord it is to be presumed that the raiyat is a "settled *raiyat*" until the contrary is proved or admitted.

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(3) The grounds on which a settled *raiyat's* rent may be enhanced have been modified, and the enhancement of his rent by suit has certainly been facilitated; but, on the other hand, the enhancement of his rent by contract has been restricted, and now there are few important rights conferred on him by this Act out of which a raiyat is competent to contract himself.

(4) All notices of enhancement have been abolished by this Act, owing to the difficulty experienced in drawing them up in accordance with the provisions of the former law, as well as of proving their service. The institution of the enhancement suit is now all the notice of enhancement required to be given to the tenant.

(5) If an occupancy *raiyat's* rent has once been enhanced by contract or suit, no suit for the further enhancement of his rent will lie until after the expiry of fifteen years [except on the gronnd of a landlord's improvement]

(6) An occupancy raiyat or his landlord's empowered to apply for commutation of rent payable in kind to a money-rent.

(7) A non-occupancy *raiyat* can now be ejected at the will of his lord, only if he has been admitted to the occupation of the land under a registered lease, and after the service on him of a six months' notice to quit, and within six months of the expiration of the term of his lease.

(8) A non-occupancy *raiyat*, who objects to pay an enhanced rent, can now have his rent fixed by the Court. If the *raiyat* refuses to pay the rent so fixed, he can be ejected. But if he agrees to pay it he is entitled to remain in occupation of the land at that rent for five years.

(9) A landlord is now bonnd to retain the counterfoil of every receipt he gives to a tenant, which receipt has to contain certain specified particulars; and every tenant is now entitled, at the end of each year, to a receipt in full or a statement of account up to the close of the year. Further, a receipt which does not contain substantially the particulars required by law will be presumed to be a receipt in full up to date.

(10) Provision has been made for tenants making improvements in their holdings, and for their recovering compensation for them in the event of eviction. A system of registering improvements, whether made by the tenant or the landlord has also now been introduced.

(11) Power has now been given to a landlord, with the sanction of the Collector, to acquire the land of any of his tenants' holdings for a reasonable and sufficient purpose having relation to the good of the holding or estate, including the use of the land for building, religious, educational, or charitable purposes.

(12) No tenant can now be ejected except in execution of a decree.

(13) Provision has been made for the appointment of common managers in the case of disputes arising between the co-owners of estates.

(14) Act VIII (B. C.) of 1879, the Act under which all settlements of Government and other estates have hitherto been made by Government, is repealed by this Act. ...As regards the record of the rights and the fixing of the rents of tenants of lands under settlement, such settlements will have ordinarily to be made under the provisions of this Act.

(15) In Chapter X provision is made empowering the Local Government, wiih the previous sanction of the Governor-General in Council, to order that a survey and record-of-rights be prepared in respect of the lands in any local

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area by a revenue officer; and, when any such records-of-rights and settlement of rent is proceeding in any local area, the ordinary Civil Courts are precluded from entertaining any suit for the alteration of the rent or the determination of the status of any tenant.

(16) Power is given to the Local Government, on its own motion, or on the application of a proprietor or of a tenant, to survey and define a proprietor's private or demesne land. .....Restriction has also been placed on the conversion of ordinary *raiyati* land into *khamar* land, so as to prevent a proprietor, in future, from putting obstacles in the way of the acquisition of occupancy-rights by his tenants.

(17) The landlord's power of distraint has been curtailed. A landlord can now only distrain through the Civil Court; and, notwithstanding the distraint, the tenant is entitled to reap, gather, and store the produce, and do anything necessary for its preservation.

(18) A landlord can no longer harass his tenant by instituting successive suits for arrears of rent against him. Three months must elapse between each successive rent-suit.

(19) A decree for arrears of rent can no longer be executed by any one who has not acquired the landlord's interest in the land; but on the other hand, the holder of a decree for arrears of rent is no longer subject to any restrictions in the execution of his decree. He is not now bound to proceed in the first instance against the movable property and person of his judgment-debtor, then against the tenure or holding itself on which the arrears have accrued, and finally, against the other immovable property of the tenant, but is at liberty to execute his decree in any way that is lawful under the Civil Procedure Code; while the tenant's tenure or holding is hypothecated for the rent, and no transfer of it is vaild while the arrears of rent which have accrued on it remain unsatisfied.

(20) The disabilities of minority and lunacy do not now apply to rent-suits.

Subinfeudation.

"It is a natural consequence of hereditary benefices," says Hallam, "that those who possess them, carve out portions to be held of themselves by a similar tenure." By the same law of nature, the Permanent Settlement gave an enormous impetus to subinfeudation. Sir George Campbell observes*: "At the Permanent Settlement, Government by abdicating its position as exclusive possessor of the soil, and contenting itself with a permanent rent charge on the land, escaped thenceforward all the labour and risks attendant upon detailed management. The zemindars of Bengal proper were not slow to follow the example set them, and immediately began to dispose of their zemindaries in a similar manner. Permanent under-tenures, known as patni-tenures, were created in large numbers, and extensive tracts were leased out on long terms. By the year 1819, permanent alienations of the kind described had been so extensively effected that they were formally ligalised by Regulation VIII of that year, and means afforded to the zemindar of recovering arrears of rent from his patnidars almost identical with those by which the demands of Government were enforced against himself. The practice of granting such under-tenures has steadily continued, until at the present day with the patni and subordinate tenure in Bengal proper, and the farming system of Behar, but a small proportion of the

* Bengal administration Report, 1873—74, p. 71.

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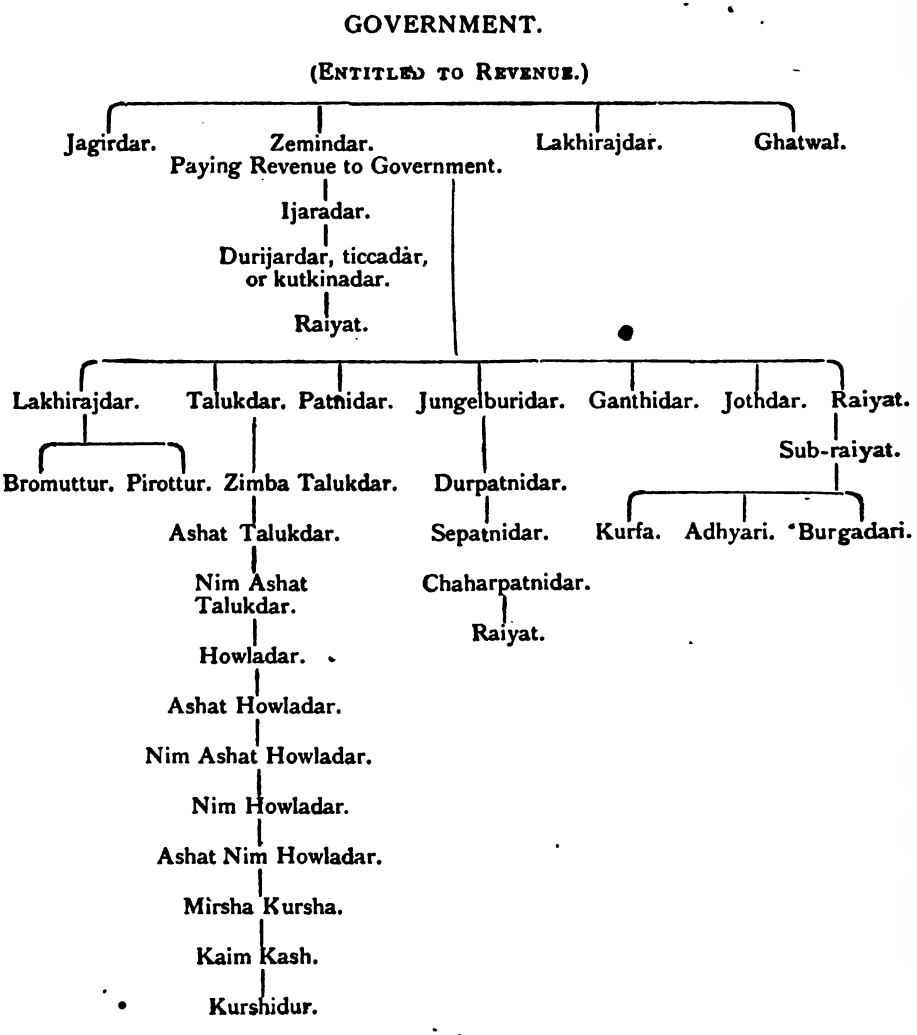
whole permanently settled area remains in the direct possession of the zemindar. When all intermediate (even to the lowest) interests became rights of property in land, not only could the owner of any such interest carve it as a subject of property into other interests, by encumbering or alienating within the limits of the right, but even his ownership itself might be of that complex heterogenous kind, which is given in Hindu joint coparcenary.

Classification of tenures.—Tenures are so numerous in Bengal that it is impossible to give an exhaustive classification of them. Mr. Field in his *Land-holding*, (p. 714) attempts it in the following table, but it will be found to be defective and will only be useful in helping the reader to form an idea on the subject:



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Mr. J. S. Cotton in his *Memorandum of Land Tenures in Bengal, dated the 31st January* 1884, treats the subject under the following heads:—

1. Zemindars.
2. Lakheraj or Revenue free land.
3. Talooks—*huzuri* or *shikmi* or *muzkauri* or *shamilat*.
4. Patni Talooks.
5. Gazusta holding in Shahabad.
6. Istumrari and mokurari leases.
7. Temporary leases in Behar—*ijara, mustagiri, thiccadari, kutkina, zeripeshgi, talagnas kismuts, gaches, mitahid, thicadars* or *kulaits*.
8. *Junglebari tenures,—howla, ausat howla, nim howla, pim ausat howla* or *tim howla, Chittagong talooks—Itmamdars, Nowbad taluks, Katubdia talukdars, Midnapore Aimas, Mandali Joots of Midnapore, the Jotedars of the Dooars, Khunt Khatidars of Chota Nagpore.*
9. Service tenures—*Chakeran, piran, Chowkidar's Chakran, pharidari.*
10. Rent free tenures—*Khyrut, bramuttur, debuttur, Mahatran, Shibuttur, piruttur, hazrut, durga*, &c.
11. Cultivators—*Khudkasht, pyekasht, occupancy and non-occupancy raiyats, bhaoli and money rent tenures.*
12. Jote Jama—*bemiadi* and *miadi* or *sursory*.
13. Halhasili Cuttigating tenures.
14. Atbundi raiyats.
15. Koorfa raiyats,—*Koorfadar, jotedar* and *burgadar; kurtali* or *kulaiti*.

Different sorts of tenures:—We propose to discuss tenures under the following heads:—

- Tenures
  - (1) Revenue-free or rent-free.
    - Jagheers—resumption.
    - Service tenures.
    - Ghatwali tenures.
    - Mokuddums.
  - (2) Rent-paying.
    - Howlas, &c., of Backergunge.
    - Jotes and Upunchowkis of Rungpore.
    - Aymadars and Munduls of Midnapore.
    - Shikimi taluks.
    - Patni, Darpatni, Sepatni and Chahar patni.
    - Istemrari tenures.
    - Mokurari tenures.
    - Thika, Zerpeshgi, Kutkina, Satua patua, &c., of Behar.

Revenue-free or rent free tenures.—Regulation XIX of 1793 recites the right of the ruling power of the country to a certain proportion of the produce of every bigha of land, and that a grant by a zemindar of land free of revenue is void; but that notwithstanding many such grants had been made, both by zemindars and officers of Government, on the pretence of applying the produce of the land to religious or charitable purposes. The British Government had adopted the principle that grants previous to the accession to the Dewani, accompanied with

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possession, should be held valid, but as no complete register of exempted lands had been formed, and as farmers and officers of Government still continued to make extensive grants, dating them or registering them as before the accession to the Dewani, it was enacted by section 2, clause 1 of Reg. XIX of 1793, that all grants for holding land free of revenue, made before 12th August 1765, by whatever authority, and whether by writing or not, shall be deemed valid, provided the grantee actually and *bondfide* obtained possession of the land so granted, and that it has not since been subject to payment of revenue by clause 2. If the land is found to have been so subject to payment of revenue for less than twelve years, but the Court is doubtful of the authority of the officer who subjected the land to such payment, the Governor General in Council shall decide the question. By clause 3, the Courts are not to adjudge any person, not being the original grantee to be entitled to hold, exempt from the payment of revenue, land now subject to the payment of revenue, under a grant before the accession to the Dewani expressly for the life of the grantee; or if not so expressed, or there is no writing and none forthcoming, then, if the grant, from its nature and denomination, shall be proved to be for life only. By clause 4, heirs are not to succeed under such grants, and where the grant is silent, it must be proved to be hereditary to entitle the heirs to succeed. If, however, one or more succeessions have taken place, the Governor-General in Council shall declare whether revenue is to be paid. By clause 5, holders of life-grants cannot transfer or mortgage beyond their own lives.

The next class of grants dealt with consists of those made since the 12th August 1765 and before 1st December 1790, the date of the consolidated Regulations upon the subject. By section 3, clause 1, all grants between these dates by any other authority than the Government are void unless confirmed by Government, and doubts as to the authority of any officer confirming such grants are to be dealt with as before directed. An exception out of this class is made dy clause 3 in favour of grants by Provincial Councils before 1175 B. S., and by clause 4 of grants before that period, whether for life or otherwise, if not more than ten bighas the produce of which is *bondfide* appropriated as an endowment on temples or to the maintenance of Brahmins, or other religious or charitable purposes, and also of such grants made before the Dewany. By section 4, the grantees or possessors of revenue-free lands alienated before 1st December 1790, are still proprietors of the lands with the same right of property as is declared to be vested in proprietors of estates or dependant taluks (according as the land exceeds or is less than one hundred bighas, as specified in sections 5, 7 and 211), subject to revenue. That revenue is to be half the usual amount when the lands are held under grants made before 1175. By section 6, the revenue which may be assessable on lands not exeeding a hundred bighas, whether in one or more villages, and alienated by one grant before 1st December 1790, shall belong to the person responsible for the discharge of the revenue of the estate or dependant taluk in which the lands may be situated, notwithstanding anything in section 8 of Regulation I of 1793; and the person so entitled to the revenue of such lands is not to be liable to any additional assessment on this account during his engagement. Such lands shall be considered a dependant taluk. If held *khas*, the revenue of the taluk shall be paid to the person entitled to receive the rents and revenue until settlement This provision gives the zemindars the revenue of the land in question. The revenue of such lands as are last mentioned, but exceeding a hundred bighas, is to belong to Government, and the lands are to be considered independent taluks (section 7) – *vide* sections 8 and 9,

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The third class of grants dealt with includes those made since 1st December 1790. These are declared absolutely void, unless made by the authority of the Governor-General in Council. Every proprietor, farmer and officer of Government appointed to collect from *khas* estates, is authorized and required to recollect the rents from such land at the pergunnah rates, and to dispossess the grantee thereof, and re-annex such lands to the estate or taluk in which they are situated, without reference to the Court or Government; without being liable, if a proprietor, farmer or dependant talukdar, to any increase of assessment during his term on account of such resumption. This provision authorizes resumption without a suit (section 10, Sonatun Ghose *v.* Moulavi Abdul Farar, B. L. R., Sup. Vol., 109). By section 20, valid hereditary grants are transferable, but the transfer must be registered within six months (sections 21—25), and the omission to register renders the land liable to revenue (sections 26 and 27). But the admission to registration is not conclusive as to exemption from revenue. This Regulation does not extend to Badshahi or royal grants, such as jagheers, altamghas, muddumash.

Badshahi grants.

Badshahi grants are regulated by Regulation XXXVII of 1793. This recites that the Native Governments occasionally granted the State share of the produce, which is the due of the State with respect to every bigha of land, for the support of the family of persons who had performed public services, for maintaining troops, &c.; that the British Government had continued those which were hereditary, and which were granted before the accession to the Dewany, and of which the grantees or their heirs had obtained possession before that period; that there is no complete register of such grants, and that fabricated and antedated grants are put forward; and that grants for life are treated as hereditary without the consent of the Government. The titles to all such lands are to be tried by the Courts and a register formed. Consequently the rules of 23rd April 1788, and subsequent dates, are re-enacted with modifications. The provisions contained in this Regulation as to the validity of grants are substantially the same as those in Regulation XIX of 1793. The Regulation is declared not to affect the zemindari or proprietary right, but only the right of the Government to revenue (section 4). Altamgha, ayma, and mudhumash grants are to be considered hereditary and transferable tenures, but succession to them must be registered. Jagheers are to be considered for life, unless otherwise expressed (section 15). See a review of the Lakheraj Regulation in Hureehur Mukhopadhya *v.* Madhub Chandra Baboo, 14 Moore's I. A., 152; 8 B. L. R., 566, S. C. See also Mutty Lal Sen Gywal *v.* Deskhur Roy. B. L. R., Sup. Vol., 774; 9 W. R., 1, S. C.; Kameshuree Dassia *v.* The Courts of Wards, 12 W. R., 251.

Resumption.

Regulation II of 1819 recites that the previous rules on this subject had been found inadequate, and that it is necessary to declare generally the right of Government to assess all lands which at the Decennial Settlement, were not included within the limits of a settled estate; not being land for which a distinct settlement had been subsequently made or which was held free of assessment under a legal and vested title; at the same time renouncing all claim to additional revenue from lands included in permanently settled estates at the settlement. In order to establish a uniform course of proceeding in resumption, it is enacted that lands not settled for and not legally revenue-free are to be liable to assessment; and the revenue of such lands, whether exceeding 100 bighas or not, is to belong to Government. This is not to affect the rights of zemindars and other proprietors of permanent settled estates (section 3, clause 1). This provision applies also

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to churs and islands formed since the Decennial Settlement, and to all lands gained by alluvion or dereliction (section 3, clause 2) as well as to lands which, although included within the limits of taluks held under special pottas, such as the *puthebadi* and *jungleboori* taluks in the 24-Pergunnahs and Jessore, were not permanently assessed at the permanent settlement. But the terms of the potta are to be observed as regards the original potta-holder or his legal representatives (section 3, clause 3). The rules as to the validity of revenue-free grants are declared applicable to grants at a fixed or mokurari jama, and to other grants limiting the demands of Government (section 4). Similarly as to lands given in lieu of pensions (section 29). Nothing in the Regulation is to affect the right of proprietors of permanently settled estates to the full benefit of the cultivation of all waste lands included in their estates at the permanent settlement, and no claim is to be made with respect to permanently settled lands on the ground of error, fraud, or any pretext whatever (section 3). See also Sonatan Ghose *v.* Moulavi Abdul Farar, B. L. R., Sup. Vol., 109.

Regulation XIII of 1825 provided for the settlement of canongoe's lands in Behar, and for the Governor-General in Council continuing in possession the holders of lakheraj tenures, where the *minhye* or lakheraj tenure is distinct from the proprietary right in the soil. Regulation XIV of 1825 was passed to declare the extent of authority vested in the revenue-officers with respect to confirmation of lakheraj. These Regulations tended to limit the wide power of ejectment at first given with respect to invalid lakheraj.

Regulation III of 1828 provided that persons suceeding to revenue-free lands and lands held on a mokurari jama, whether by transfer or inheritance, shall give notice to the Collector. Tenures not duly registered, or to which the specification does not show an hereditary title, or that it is a perpetual endowment, shall be liable to resumption, unless they have been declared to be hereditary by a final decree of a Court on the demise of the persons in possession at the date of Regulations XIX and XXXVII of 1793. The Regulation provides also for ascertaining the nature of claims to exemption from assessment by the whole deed and not merely from the designation of the tenure. Jagheers consequently shall not be held to be for life only, if the tenure granted is clearly hereditary; nor shall any tenure be considered hereditary unless expressed to be hereditary or perpetual (section 12). With regard to the sale of lands of lakheraj tenure, it is provided that section 9, Act VII of 1868 (B. C.), that when such lands have been sold before that Act for arrears of revenue or demands in the mode provided by Act XI of 1859, the sale shall have the same force and effect against the person liable to pay the revenue or demand as a sale in execution of a decree.

These Regulations have been reviewed in Maharajah Dheeraj Rajah Mahtab Chand Bahadur *v.* The Bengal Government, 4 Moore's I. A., 466, and it has been decided with regard to the holder of land resumed by Government that the proprietor must be settled with; he must be assessed, not evicted—Hureehur Mukhopadhaya *v.* Madhub Chunder Baboo, 4 Moore's I. A., 152; Mahomed Israel *v.* Wise, 13 B. L. R., 118; see, however, Bheekoo Singh *v.* The Government, 10 W. R., 296. The zemindar of course has, since the permanent settlement, no power to free any part of his land for payment of revenue; he may, however, still make rent-free grants—Mutty Lall Sen Gywal *v.* Deskhar Roy, 9 W. R., 1, where such grants are fully discussed; Rajah Nilmani Sing Deo *v.* The Government, 6 W. R., 121; Ahmudoollah *v.* Mihtoolah, 3 Agra Report, 186. As to the zemindar's power to grant free of revenue, see Sonatun Ghose *v.* Moulavi Abdul Farhar, B. L. R., Sup. Vol., 109, at pp 150 and 151; and as

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to altamghas for charitable purposes, see Jewun Dass Shahoo *v.* Sheik Kubeeruddin, 2 Moore's I. A., 390, at pp. 403, 408—410 and 419. A zemindar seeking to resume must make a *primâ facie* case that rent has been received on account of land sought to be resumed since 1790, or that the lands in question were part of the *mal* lands of his zemindari at the permanent settlement. The holder must then, in order to maintain his plea of exemption, show that the lands were rent-free before 1790—In the matter of Mudhusudan Chakladar, S. D. A. (1853), 365; Parbuti Charan Mukerji *v.* Rajkrishna Mukerji, B L. R., Sup. Vol., 162; Maharajah Dheeraj Mahtab Chand Bahadur *v.* The Bengal Government, 4 Moore's I. A., 466, at p. 497; Hureehur Mukoopadhya *v.* Madhab Chunder Baboo, 14 Moore's I. A., 152; Omesh Chunder Roy, *v.* Dukhina Sundari Debia, W. R., F. B., 95; 8 B. L. R., 566, S. C.

A dependant putnidar (shikami) can resume invalid lakheraj within his putni—Rao Ram Sunkur Rai *v.* Maulavi Syud Ahmud, S. D. A. (1848), 234; In the matter of Raj Kishore Rai S. D. A. (1849), 66; Raj Kishore Rai *v.* Soomer Mundle, S. D. A. (1850), 498. But the manager of a religious edowment, to which the zemindar has granted the profits of a certain number of villages after paying revenue, cannot resume invalid lakheraj within the limits of the grant: that right remains with the zemindar—Nobin Chander Roy Chowdhry *v.* Pearee Khanum 3 W. R., 143. After resumption of a grant made before 1790, the zemindar is entitled to rent, but not to possession of the land—Magnee Ram Chowdhry *v.* Babu Gunesh Dutt Singh, W. R., (1864), 275. It has been held that resumption by Government does not destroy under-tenures; but the under-tenants can be compelled to pay the assessment in addition to their rent or to give up their tenures—Fuzul Banoo *v.* Azeezunessa Bibi, 3 W. R., 72 overruling Muhunt Sheodas *v.* Bibi Ikram, S. D. A. (1850), 167; Anund Mayi Chowdrain *v.* Ram Kant Sein, S. D. A. (1860), 660; Protab Narain Mookerji *v.* Madhusadan Mookerji, 8 B. L. R., 197; Must. Farzhara Banu *v.* Must. Azezunnesa Bibi, B. L. R., Sup. Vol., 175. This however, must be taken to be subject to the ordinary limitation of the zemindar's power of enhancing rents of his tenants. Resumption suits were comparatively rare before 1845, but an impetus was given to them in that year and again in 1855.

With regard to royal grants, it has been held that a jagheer, according to ancient usage, was only a life tenure—Collector of Bareilly, *v.* Martindell, 2 Sel. Rep., 188. A grant of a jagheer is a grant of the Government rights; and it has been held that the jagheerdar must allow the zemindar *malikana*—Mahomed Ismail Jamadar *v.* Rajah Balunjee Sarsun, 3 Sel. Rep., 345, Cuttack case. A jagheer in Chota Nagpore granted on an hereditary tenure for military services has been held to be resumable by the zemindar on failure of the lineal heirs of the grantee. The zemindar in this case appears to have resumed such grants as he pleased, before the British rule: and resumption for want of heirs was found to be customary in that distrct—Thakurain Musst. Roopnath Koonwar *v.* Maharaj Jugunnath Saha Deo, 6 Sel. Rep., 133. A *fouz serinjam* grant, or grant for military services, was held not resumable by Government so long as the holder did not refuse to perform the services—Sparrow *v.* Tanajee Rao Rajah Sirke, 2 Borr., 501 and Morley's Digest, 404. See Beema Shunkur *v.* Jamasjee Shappojee, 5 W, R., (P. C.) 121. See as to *altamgha enams and amaram grants*—Unide Rajah Rajahe Bommaranze Bahadur *v.* Prem Masani Venkatadry Naidoo, 7 Moore's I A., 128 to 147. See as to a *Faisal Jahgeer*, Forrester *v.* Secretary of State for India, 12 B. L. R., 120. A *muddumash* grant to a person and "other fakeers,' has been held to create an hereditary tenure—Shaha Uzeezoollah

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v. The Collector of Shaharunpore, 4 Sel. Rep., 213. See for instance *altamgha* grants by firmans followed by purwanahs—Musst. Quadira *v.* Shah Kâbiruddin Ahmed, 3 Sel. Rep., 407; Jennu Dass Sahoo *v.* Shah Kabiruddin, 2 Moore's I. A., 390, at p. 408; of a muddumash grant for similar purposes—Bibi Kaniz Fatima *v.* Bibi Sahebajan. 8 W. R., 313. As to polliams, see Naraganty Lutchmee Davama *v.* Vengama Naidoo, 9 Moore's I. A., 66; The Collector of Madura *v.* Verracamoo Ummal, 9 Moore's I. A., 446. For *cuttoo gootager* tenure, see Vencata Swara Yettiapah Naiker *v.* Alagoo Moothoo Serra Garen, 8 Moore's I. A., I. A., 327. A grant of land as *pudangha* (water for washing the feet), made to a mohunt is prepetual—Collector of Bundelknnd *v.* Churun Das Byragi, 3 Sel. Rep., 415.

Service tenure.

With respect to lands held upon service tenures there has been considerable conflict as to the circumstances under which they are resumable, particularly in the case of ghatwali tenures. It has been held that the service need not be performed by the holders of the tenure in person but they must be responsible for its performance—Shiblal Singh *v.* Moorad Khan, 9 W. R., 126. And it has been held that the rent of a service jagheer cannot be enhanced before resumption since the jagheerdar is entitled in such a case to be relieved from the services—Nilmani Sing Deo *v.* Ram Golal Sing Chowdry, Marshall 518. With respect to the right to resume, it was held in several cases that the zemindar could resume upon default in performing the services, or if the holder was dismissed, although the holding was hereditary—Bhugoo Rae *v.* Azim Ali Khan, S. D. A. (1855), 84; Nilmani Singh Deo *v.* Ram Golal Singh Chowdry, Marshall, 518: Hureenarain Ghose *v.* Musst. Dinoo Dasi, S. D. A (1857), 783; Maharajah Sreesh Chunder Rae *v.* Madhub Mochi, S. D. A. (1857), 1772; Tekayet Jugo Mohan Singh *v.* Rajah Leelanund Sing S. D. A. (1858), 1417; Ram Chunder Chakravarti *v.* Gopal Mirdh, S D. A. (1860), Vol. II, 315; Chundernath Roy *v.* Bheem Sirdar, W. R. (1864), Act X 37; Ramgopal Chuckerbutty v. Chunderanth Sein, 10 W. R., 289. In a subsequent case (Forbes v. Meer Mahomed Tuque, 5 B. L. R., 529, at p. 543; 13 Moore's I. A., 435; 14 W. R., P. C., 28) it was held that this right exists only when the continued performance of the service is the condition of the grant, and not merely something entering into the motive or consideration for it. In this case the grant was of a jagheer before the permanent settlement, which provided for the jagheerdars maintaining a body of men to keep off elephants but did not make that service a condition of a continuance of the tenure; past services being also part of the consideration of the grant. The grantees had held without objection from the zemindar long after the necessity for keeping off elephants had ceased. The Government had assesssed the zemindar for the lands, and he in turn sought to assess the jagheerdars on the ground that the services referred to were no longer required. It was held he was not entitled to assess the lands. The zemindar seems to have assessed for these lands as chakran under Regulation VIII of 1793, section 41. The chowkidari lands in the zemindari of Burdwan were annexed to the zemindar's under section 41 of Regulation VIII of 1793, but were not assessed; they were included in order to be a security for the revenue, but were not assessed, because the zemindar had not the full benifit of them. The zemindar claming to resume these lands was held not entitled to do so; but was held entitled to support the chowkidar, who was bound to render the customary service to the zemindar.—Joykisnen Mookerji *v.* The Collector of East Burdwan, 10 Moore,s I. A. 16.

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Ghatwali tenures.

With regard to ghatwali tenures, those in Khurruckpore have been held hereditary, the sunnud containing the terms *mokurari istemrari* and the lands having long descended in the family—Monorunjun Sing *v.* Rajah Leelanund Singh, 3 W. R., 84; Rajah Leelanund Singh Bahadur *v.* Thakur Monorunjun Singh, 13 B. L. R., 124. But where these words are not used, they have been held resumable—Rajah Leelanund Singh *v.* Surwan Singh, 5 W. R., 290, 292; 2 Ind. Jurist, N. S., 149; 9 Sev. Rep. 311: and this is said to hold whether the services were no longer required, or the ghatwals neglected to perform them—Tekayat Jugomohum Singh *v.* Rajah Leelanund Singh, S. D. A. (1857), 1812. And it has been further held that these tenures cannot be sold in execution of a decree without the zemidar's consent—Surtuck Chunder Deo *v.* Bhagut Bharut Chunder Singh S. D. A. (1853), 900; Rajah Leelanund Singh *v.* Doorgabutty, W. R. (1864), 249; Kustoora Koomaree *v.* Binodram Sein, 4 W. R., Mics. 5; Lala Gooman Singh, *v.* Grant, 11 W. R., 292. Ghatwali holdings have also been onsidered indivisible—Musst. Kustoora Kumaree *v.* Monohur Deo, W. R. (1864), 39, at p. 42; Hurlal Sing *v.* Jurawan Sing, 6 Sel. Rep., 169; and a woman may be a ghatwal—Must. Kustoora Kumari *v.* Monohur Deo, W. R. (1864), 39. As to the descent of these tenures to the eldest son, see Musst. Teetoo Kunwari *v.* Surwan Sing, S. D. A. (1853), 765. See as to ghatwali and servicetenures, Rajah Leelanund Singh Bahadur *v.* Government of Bengal, 6 Moore's I. A., 101; 4 W. R. (P. C.), 77, S. C. Sometimes ghatwals paid a small quit rent aswell as rendering service. These are considered to have an hereditary tenure—Rajah Leelanund Singh Bahadur *v.* The Government, 2 B. L. R., A. C., 114. It is not necessary that the sunnud should express that the holding is hereditary, if it has been so held for a sufficient time—Baboo Kuldip Narain Singh *v.* Mahadeo Singh, 6 W. R., 200; B L. R., Sup. Vol., 559. Kuldip Narain Singh *v.* The Government 11 B. L. R., 71; 14 Moore's I. A., 247. It has been held that a ghatwali tenure ceases when in consequence of the Government having made other provisions for police, the services are no longer required—Rajah(Leelanund Sing *v.* Nuseeb Sing, 6 W. R., 80; Rajah Leelanund Sing, S. D. A. 1857, 1812; on review, S. D. A. (1855), 1471; Rajah Anandlal Deo *v.* Government S. D. A. (1858), 1669. In this case the ghatwals were liable to be dismissed for neglect of duty, and the Government had never interfered in this appointment or dismissal of them. When ghatwali lands have been assessed as part of a zemindari the Government cannot resume or claim further revenue from the zemindar —Rajah Leelanund Sing Bahadur *v.* The Bengal Government, 6 Moore's I. A., 101; 4 W, R., (P. C.), 77, S. C. But on the other hand, it has been held that an auction-purchaser of the zemindari cannot resume on the suggestion that the services have ceased, at least if the Government has a joint interest with the zemindar in the continuance of the services and opposes the resumption. In this case the zemindar paid as revenue the same amount as the ghatwals paid as rent. It has been further held that even when the grant is upon condition of service, the zemindars cannot, by dispensing with the service, put an end to the grant—Baboo Kooldip Narain Sing *v.* Mahadeo Singh, 6 W. R., 199, at p. 283; The Government of Bombay *v.* Damodar Pamananday, 5 Bom. H. C. R. (A. C.), 202. This applies to all service tenures. And where the Government consented to dispense with the ghatwali services as regarded the zemindar, and took from him instead additional revenues it was held that nevertheless an auction-purchaser from the zemindar could not dispossess the ghatwals, although the sunuud was of a date subsequent to the permanent settlement—Rajah Leelanund Sing Bahadur *v.* Thakur Monorunjun

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Sing, 13 B. L. R., 124. This was in the Khurruckpore zemindari. But in the same zemindari, when the appointment of the ghatwals rested with the zemindars, it was held that the Government, having dispensed with the ghatwali services the zemindar was not bound to make any fresh appointment—Mahboot Hossein *v.* Musst. Patasoo Kumari, 1 B. L. R. (A. C.), 120; 10 W. R., 179. The ghatwali tenures of Beerbhoom have been the subject of legislation. Regulation XXIX of 1814, after reciting that these tenures are hereditary and subject to a fixed rent and services to be rendered to the zemindar, and that these rents have been recently adjusted and made payable direct to Government, enacts that the ghatwals shall not be ejected or their rent enhanced so long as they observe their own obligations: but that the tenure may be sold for arrears in the same way as other tenures, *i.e.*, transferred by the Governor-General in Council to some other person, the zemindars taking any increase of revenue thus obtained. And Act V of 1859, after reciting that it has been held that the holders of ghatwali lands contemplated by Regulation XXIX of 1814 have no power to create an interest extending beyond the life of the holder, enacts that they shall have the same power of granting leases as other proprietors; but not to extend beyond the grantor's life or incumbency unless granted for certain specified purposes and approved by the Commissoners—Gonsham Jana *v.* Musst. Kuneeha Dabi, S. D. A. (1860), 504. It has been since held that *ghatwali* tenures are not liable for the ancestor's debts in the hands of his successor or heir—Bama Shunkur *v.* Jamasjee Shapujee, 2 Moore's I. A., 23. *Vide* notes under section 181, *post*.

Mokkuddami tenure.

It has been held that the zemindar cannot extinguish a *mokuddami* tenure in Cuttack, since such a tenure is not derived from the zemindar—Gonsham Jana v. Musst. Kuneeha Dabi, S. D. A. (1860), 504. And it has been held that the hereditary pergunnah officers appointed to keep the accounts are still entitled to their fees when the pergunnah is granted in enam or jageer, and that whether they perform services or not, if willing to do so—Bama Shunkur v. Jamasjee Shapujee, 2 Moor's I. A., 23. And the *mokuddums* of Bhagulpore have been held entitled to all the privileges of maliks, and to be quite independent of the zemindar or chowdhry—Morley's Digest. Vol. I., p. 406 (note); Runglal Chowdry *v.* Rama Nath Das. The *mokuddums* are consequently not liable to pay any chukladari fees—Munsur Nath Chowdry *v.* Bhowani Charan, 4 Sel. Rep., 126. Nor is the zemindar liable to pay mokudduma, chowdraee or chukladari dues—Kalian Chowdhry v. Rajah Ikbulli, 4 Sel. Rep., 215. Again in the Madras Presidency a paiki huk was held to be anexed to the office of desai, and not to be resumable by Government—The Government of Bombay *v.* Desai Kallian Rai Hakoomut Rai, 14 Moore's I. A., 551.

Service-tenures not governed by this Act.

Section 181 of the Bengal Tenancy Act provides that "nothing in this Act shall affect any incident of a ghatwali or other service-tenure, or in particular shall confer a right to transfer or bequeath a service-tenure which, before the passing of this Act, was not capable of being transferred or bequeathed.

Rent-paying tenures.—Rent-paying tenures are numerous. We have first *huzuri, kharija, mazkuri shamilat, shikmi* or independent taluks and dependent taluks which are provided by Regulation VIII of 1793. Then *patni taluks*, whose incidents are described in Regulation VIII of 1819, *istemrari* and *mokurari mourasi* tenures which have been discussed under clause (8) of section (3), and under sections 10 to 15 of Bengal Tenancy Act, *post*. *Thika* or *mustagiri* leases of Behar or ijara leases of Bengal are forming leases of the whole or portions

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of an estate. *Zurpeshgi* is a similar lease granted in consideration of an advance paid by the lessee to the lessor, in which the latter's right of re-entry is contingent on the repayment of the advance. *Kutkina* is a sub-lease from a *Thikadar*. *Durkutkina* is a sub-lease from a *Kutkinadar*. *Satua Patua* or *Soodbhurna* is an usufructuary lease which provides for the payment of principal and interest, but sometimes of the interest alone from the usufruct of the land. *Thika Zurpeshgi, Kutkina, Durkutkina, and Satua Patua* leases are peculiar to the Behar Districts. We have the *howla* and *ausat* tenures and their sub-divisions in Backergunge adverted to before, and a tenure called *upanchuki* in Rangpore, a name said to be derived from a cess of one-fifth, apparently a mokurari istemrari tenure—Madhub Jana v. Raj Krishen Mookerji, 7 W. R., 96; Shibkumar Toti v. Kali Prosad Sen, I. B. L. R. (A. C.), 167. *Gorabundi* is a similar tunure in Bhagulpore and *mirasdari* in Sylhet. *Ihtimam* is a name given to small taluks in Chittagong, and formerly used in Burdwan and Rajshahye. It is like the kaimi taluk, and the rent is not theoretically subject to increase, but in practice if the talukdar is persuaded by a new auction-purchaser or otherwise to consent to some small increase, he generally manages to get some corresponding aid in the rent payable by his *itmamdar*. The *itmamdar* is also generally a cultivator, but he enjoys the same power as the talukdar of granting permanent leases to under-raiyats. Hence the creation of *dur-itmams* and *kaimi* raiyati leases. We have also the *guzusta* tenures of Shahabad, which is more a raiyati tenure. The *gantidari* in the Jessore and 24-Pergunuahs, districts, the *thtkadars* in the south part of the 24-Pergunnahs, the *chukdars* in the Sunderbans, the *howladars* of Jessore, Backergunge and Noakhali, the *talukdars* of Chittagong the *jotedars* of Rangpore and Julpaiguri and of the eastern portion of Jessore, the *aimdars* and *mundals* of Midnapore, the *kutkatidars* of Chota Nagpore are different names for the reclaimers of jungle in different districts and places who claim a taluki right and interest in the land they have brought under cultivation, and may be all classed under *jungleboori* tenure-holders.

Tenures of Backergunge; howla, nimhwola, &c.

In Backergunge there are as many as thirteen persons having successive interest in the land inferior to that of the proprietor or zemindar. These interests are: (1) zemindari, (2) taluk, (3) zimba taluk,[1] (4) shamilat taluk, [5] ashat taluk, [6] nim ashat talak, (7) howla,[2] (8) ashat howla,[3] (9) nim ashat howla,[4] (10) nim howla,[5] (11) ashat nim howla or bye-howla,[6] (12) mirash karsha, (13) kaim karsha, (14) karshadar or raiyat—*Field's Digest of the Law of Landlord and Tenant, p. 2, note; The Rent Commission Report, page* 10:—

"The origin of most of the taluks and howlas," observed the Rent Commission, "appears to have been a grant of a considerable tract of waste land upon favourable terms as to rent to some one who undertook to bring it under cultivation. The grantee reclaimed portions and sub-let portions to smaller reclaiming tenants; or perhaps sub-let the whole if he could find tenants to reclaim it. These sub-lessees sub-let again; and sub-letting was carried still lower, until the

1 Baboo Gopal Lall *v.* Teluk Chunder Rai, 10 Moore's I. A., 185.

2 Jaggut Chunder Roy *v.* Ramnarain Bhuttacharjee, 1 W. R., 126; Madhub Chunder Ghose *v.* Nilkanto Shaha Roy, 2 W. R, 42; Doorga Sundari Debia *v.* Dinobundhoo Kaiburta Dass, 8 W. R., 475.

3 Hurre Churun Bose *v.* Meherunnessa Bibi, 7 W. R., 318.

4 Mahomed Kadur *v.* Puddo Mala, 2 W. R., 185.

5 Mahomed Kadur *v.* Puddo Mala, 2 W. R., 185; Doorga Churn Kur Sircar *v.* Anund Mayi Debi, 3 W. R., 127.

6 Ruttun Moni Debi *v.* Kumalakant Talukdar, 12 W. R., 364.

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whole tract was divided into holdings of a manageable size for single families. The number of grades doubtless varied with the size of the tract originally leased and with the denseness of the population in the particular locality. Not uncommonly those who had reclaimed land sub-let it when the demand for land increased; or a person who had taken enough for two or three holdings reclaimed and retained enough for one and sub-let the remainder. It is easy to imagine the intricacy of interests which must have been the result of such a system. Sometimes the zemindar's grantee embarked a little capital, making advances to needy raiyats forced out by the pressure of population from densely-inhabited localities, and thus enabling them to buy ploughs and cattle and seed, and build homesteads. This was probably necessary at starting a new settlement. As matters progressed, and if the venture was successful, new settlers had to pay a *salami* or fine to the grantee before he assigned them lots in his grant. In many instances the chief capital taken to the work of reclamation was the labour of those who accompanied the grantee as a leader in whom they had confidence. Where the waste has been wholly reclaimed and the land fully occupied, we find persons occupying the double portion of landlord and tenant, paying rent for an entire lot, cultivating part and sub-letting part to persons who perhaps again repeat the process. In the case of persons called talukdars, no difficulty appears to have arisen, the word '*taluk*' carrying with it a definite kind of meaning, and being found well as in the old Regulations as in Act X of 1859. With the *howladars*, however the state of the case is not so clear. Are they talukdars? Do they hold an under-tenure in the vague sense in which the word has hitherto been used? If so, what is its nature, and what are its incidents? Are the raiyats entitled to acquire a right of occupancy? And if so, what becomes of the middlemen below them and of the raiyats in the bottom?"

Jotedars of Rungpore.

The same difficulty arises with respect to the *jotedars* of Rungpore. The Rent Commission quote from Mr. Glazier the following passage: "The raiyat who holds direct from the zemindar is called a *jotedar*, and his holding is a *jote*, whatever its size, which may and does vary from one paying a rent of one rupee to one of which the rent is half-a-lakh: the large majority of *jotedars* have small holdings and are raiyats proper, cultivating their lands either by their own or hired labour, or on the system of *adhiyari* or halves, but a large number of *jotedars* have raiyats under them who are called either *chukanidars, or kurfa projas*. The *chukanidars*, too, have often raiyats under them, and in some cases, specially in the larger *jotes*, there are four or more degrees before you get to the actual cultivator. *Jotes* are saleable quite irrespective of the term during which they have been held, whether *jotes* held direct from the zemindar, or *chukani jotes* which are held from a *jotedar*. If a man gets a *jote* to-day he can legally transfer it by sale tomorrow. Such sales of *jotes* by registered deed or on the decree of Court are of daily occurrence."

The aymadars and munduls of Midnapur.

Persons in apparently similar position are to be found in other districts under various appellations, *jungleboori raiyats, munduls, aymadars*. "The origin of all," observed the Rent Commission, "is probably similar, though the exact rights accorded to each by custom may vary in different districts. In Midnapore the settlement-officer, Mr. Price, found certain *aymadars* who were receiving from raiyats subordinate to them rents one hundred per cent. higher than those which they were paying to Government. Some of these *aymadars* who would not agree to the terms offered them by the settle-

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ment-officer were put aside, and the settlement was made with the tenants immediately below them. Litigation ensued, and these *aymadars* were declared by the Civil Court to the raiyats having a right of occupancy. It would appear, however, that though the subordinate tenants were parties to this case, it was substantially decided between the Government and the *ayamadars*. It would have been more satisfactory if these tenants had taken an active part in the pleadings, and in consequence their position had also been fully considered in determining the right of the *aymadars*. In parts of Midnapore bordering on the jungle mehals, there is a class of person termed *munduls* who came into existence in the following manner: The zemindar granted a tract of wasteland to a substantial raiyat, termed an *abadkar*, who undertook to bring it under cultivation, paying the zemindars a stipulated lump sum as rent. This *abadkar*, partly by the labor of his own family and dependants, and partly by including other raiyats to settle under him, gradually reclaimed the greater part of the grant and established a village upon it, to which he usually gave his name, and as the head of the settlement, he was called *mundul* or headman. The zemindar and the *mundut* from time to time re-adjusted the terms of their bargain, but the zemindar never interfered between the *mundul* and his under-tenants. In settlement proceedings of 1839, these *munduls* were declared to have only the rights of *sthani* or *khudkasht* raiyats, and not to be entitled to any *munafa* or profits; but though not exactly recognised as *talukdars*, they gradually acquired rights superior to those of ordinary *khudkasht* raiyats; and as they were left to make their own terms with the raiyats settled by them, they must have had a very considerable profit besides what they obtained from any land cultivated by themselves. Their *munduli* right became transferable by custom; and when at the settlement they came into immediate contact with the Government, though not recognised as regular *talukdars*, they were held entitled to the consideration which in Bengal has usually been recorded to the first reclaimer of the virgin soil."

Sarbarakari tenures of Cuttack.

The *sarbarakari* tenures of Cuttack are permanent and hereditary, and with the consent of the zemindar transferable—Doorjodhun Das *v.* Choonya Daye, 1 W. R., 322; Sudananda Myti *v.* Nouruttun Myti, 1 W. R., 290; 8 B. L. R., 280; Kasheenath Pane *v.* Lakhmani Persad Putnaik, 19 W. R., 99. A *gantee* or *ganthe* is an hereditary tenure at a fixed rent; the name is said to be derived from a Sanskrit word meaning a *kust* or engagement—Bepin Behari Chowdhry *v.* Ram Chundra Roy, 5 B. L. R., 235. *Bhekbirt* is a name given to taluks sometimes of considerable size in Saran. *Birt* land is held for religious purposes or by Brahmins free of revenue, and it is held under a heritable istemrari tenure sometimes known as *Birt ijara*—Morley's Digest Gloss. *Vide* Whinfield's Landlord and Tenant, 5.

The Bengal Tenancy Act has devoted Chapter III to tenure-holders, and general provisions of the Act apply to them. The only exceptions are those enumerated in section 195.

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Act X 1859.	Act VIII 1869 B.C.	Act VIII 1885.	Act X 1859.	Act VIII 1869 B. C.	Act VIII 1885.	Act X 1859.	Act VIII 1869 B. C.	Act VIII 1885.
...	1	3				nil	57	omitted
2	2	158	28	omitted	omitted	82—91	omitted	omitted
3	3	50 (1)	29	(24)	omitted	92	58	Sch. III (2b)
4	4	50 (2)	30	27	Sch. III (1) & (3)	93—104	omitted	omitted
5	5	51, 35	31	28	omitted	105	59, & 60 & 61	162- 165
...	...	27	32	29	Sch. III (2b)	nil	62	171, 172
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7	7	omitted	33	30	omitted	107	omitted	omitted
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nil	9	omitted	nil	31	Sch III (2a)	110—111	omitted	omitted
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11	12	omitted	nil	33	144	116	72	125
12	13	,,	nil	34	143	117	73	omitted
			nil	35 & 36	.....	118	74	126
13	14	,,	nil	37	91	119	75	omitted
14	15	,,				120	76	omitted
15	16	50 (1)	nil	38—40	103—109	121	77	130
						122	78	omitted
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17	18	30, 52 (6)	nil	41	92	123	79	122
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THE BENGAL TENANCY ACT.

(ACT No. VIII OF 1885.)

AS AMENDED UP TO DATE.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

(Received the assent of His Excellency the Governor-General on the 14th March, 1885.)

An Act to amend and consolidate certain enactments relating to the Law of Landlord and Tenant within the territories under the administration of the Lieutenant-Governor of Bengal.

Preamble.

WHEREAS it is expedient to amend and consolidate certain enactments relating to the law of landlord and tenant within the territories under the administration of the Lieutenant-Governor of Bengal: It is hereby enacted as follows :—

CHAPTER I.

PRELIMINARY.

Short title.

1. (1). This Act may be called the Bengal Tenancy Act, 1885.

Commencement.

(2). It shall come into force on such date (hereinafter called the commencement of this Act) as the Local Government, with the previous sanction of the Governor-General in Council, may, by notification in the local Official Gazette, appoint in this behalf.

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(3). It shall extend by its own operation to all the territories for the time being under the administration of the Lieutenant-Governor of Bengal, except the town of Calcutta, the Division of Orissa, and the Scheduled Districts specified in the third part of the first schedule of the Scheduled Districts Act, 1874; and the Local Government may, with the previous sanction of the Governor-General in Council, by notification in the local official Gazette, extend the whole or any portion of this Act to the Division of Orissa or any part thereof.

Local extent.

The Bengal Tenancy Act not a complete Code.— This Act does not purport to be an exhaustive codification of the law of landlord and tenant. The title is "An Act to amend and consolidate *certain enactments.*" For special enactments not affected by this Act, see section 195 which saves patni and other laws. For enactments amended and consolidated by this Act, see Schedule I. In territories in which this Act is not in force, other enactments regulate the relations of landlord and tenant.—see *post*.

Commencement of Act.—The Act came into force on the 1st November 1885, (Not., 4th September, 1885, Cal. Gaz. 9th September, 1885). By Act XX of 1885, the operation of sections 61 to 64, both inclusive, and of chapter XII of the Act, except such of their provisions as confer power to make rules, was postponed to 1st February, 1886. Act XX of 1885 has been repealed by Act XII of 1891.

Rent Law of the town of Calcutta.—In the town of Calcutta proper, the relations between private landlords and their tenants are governed by the ordinary law of contract. The Contract Act must be considered to apply to it.—(Madhab *v.* Raj Kumar, 14 B. L. R., 76, Couch, C. J.). Where the ordinary laws of contract are not applicable, Section 17 of 21 Geo. III, Cap. 70, provides that 'inheritance and succession to lands, rents and goods, and all matters of contract and dealings between party and party, shall be determined, in the case of Mahomedans, by the laws and usages of Mahomedans, and in the case of Gentoos, by the laws and usages of Gentoos.' In the absence of express authority, I am of opinion that tenancy created by express contract between Hindus in Calcutta is within the words 'matters of contract and dealing between party and party' in 21 Geo. III, Cap. 70, section 17, and the right of the parties and the incidents of the tenancy must be governed by Hindu Law"—(I. L. R., 5 Cal. 688, *per* Wilson, J., in Russiklal *v.* Lokenath). If one of the parties is a Mahomedan or Hindu, by the laws & usages of the defendant—(Jagat Mohini *v.* Dwarka Nath, I.L.R. 8 Cal 582.) If the provisions of the Contract Act do not apply, & both parties are English, then the Common Law of England will apply—See Rusik Lal *v.* Lokenath, I.L.R. 5 Cal. 688. But the Bengal Tenancy Act applies to lands situated outside the limits of the town of Calcutta but within its Municipal limits

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as defined by Bengal Act II of 1888.—(Biraj Mohini *v.* Gopeswar Mullik, I. L. R. 27 Cal. 202). Ground rent or revenue due to Government in respect of land situated in Calcutta is realised by a summary process under Act XXIII of 1850.

Rent Law of Orissa.—In Orissa, Acts X of 1859, VI, B.C. of 1862, and IV, B.C. of 1867 are in force. (Sadananda *v.* Narathan 16 W.R. 289). The mahal of Banki which was once a scheduled district is now included in Katak by Act XXV of 1881. The Lt. Governor with the previous sanction of the Governor-General in Council extended the following portions of the Bengal Tenancy Act to Orissa:—Chap. X & sections 3 to 5, 19 to 26, 41 to 49, 53 to 75, & 191.—(Not., 10th Sept. 1891, *Cal. Gaz.*, 16th Sept. 1891); sections 27-38 & 80 (Not., 27th June 1892, *Cal. Gaz.*, 29th June 1892); sections 189 & 190 (Not., 5th January 1893, *Cal. Gaz.*, 11th January 1893); sections 39 (Not., 7th January, 1896, *Cal. Gaz.* 8th January 1896); sections 7, 40, 52 & 192 (Not., 17th October, 1896, *Cal. Gaz.*, 21st October 1896). By a notification dated the 18th January 1893 (*Cal. Gaz.*, 25th January 1893), the rules framed and validated under sections 189 & 190 of the Tenancy Act were declared to be in force in Orissa, so far as they relate to the sections of the Bengal Tenancy Act which have been or may be extended to that division (see Board's Survey & Settlement Manual, 1901 Pt. III, Chapter 2, rule 7 (IV), page 71). By a notification, dated 5th November 1898, *Cal. Gaz.*, 9th November 1898), the provisions of the Bengal Tenancy Amendment Act III, B.C., of 1898 were extended to the Division of Orissa.

Rent Law of the Scheduled Districts.—Part III of the First Schedule of Act XIV of 1874 specifies following districts as the Scheduled Districts, Bengal:—

Districts.

(South of Teesta.)

I. Jalpaigori and Darjeeling Divisions.

Jalpaigori (North of Teesta).

II.—Chittagong Hill Tracts (Act XXII of 1860).

III,—The Sonthal Pergunnahs.

IV.—The Chutia Nagpore Division.

V,—The Mahal of Angul and Banki (Banki has been withdrawn from the Scheduled Districts by Act XXV of 1881 and annexed to the District of Cuttack).

Jalpaiguri.

The district of Jalpaigori is divided by the river Teesta into two portions north of Teesta & south of Teesta. The portion which is to the South of Teesta was formerly portion of the District of Rangpur and comprised the Thanas of Jalpaigori, Titaloya, Rajgunge, Boda and Patgram. Act X of 1859, VI B. C. of 1862 & IV B. C. of 1867 were in force in this tract. But in that portion of the district of

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Jalpaigori which was ceded by the Bhutan Government to the British Government in 1866, and which is commonly known as the Western Duars, Act XVI of 1869 (The Bhutan Duars' Act) was in force up to the 16th October 1895. Act XVI of 1869 was, however, repealed by Act VII B.C. of 1895 on the 13th November 1895, & Act X of 1859 & VI B. C. of 1862 were extended to this tract (See Cal. Gaz., 13th November 1895). Subsequently by notification No. 963 T.R., 5th November 1898, the Lt.-Governor with the sanction of the Governor-General in Council has extended the Bengal Tenancy Act to the whole of the Jalpaigori District, except the Western Duars, with effect from the 1st January 1899, subject to the following restrictions & modifications: (1) sub-sections (2) & (3) of section I of this Act should be omitted; and (2) the words "in the territories in which this Act extends by its own operation" in subsection (1) and the whole of subsection (2) of section 2 shall be omitted. By notification No. 964 T. R., 5th November, 1898, similarly the Bengal Tenancy Act was extended to the portion of the Jalpaigori district, known as Western Duars, with effect from the 1st January, 1899, subject to the same restrictions and modifications, as well as to the following: (3) Nothing in this Act other than the provisions of sub-section (1) of section (2), as modified by clause II of this notification, shall apply to any lands heretofore or hereafter granted or leased by Government to any person or Company under an instrument in writing for the cultivation of tea or for the reclamation of land under the Arable Waste Law Rules; (4) where there is any thing in this Act which is inconsistent with any rights or obligations of a *jotedar, chukanidar, dar-chukanidar, adhiar,* or other tenant of agricultural land as defined in settlement proceedings heretofore approved by Government, or with the terms of a lease heretofore granted by Government to a *jotedar, chukanidar, dar-chukanidar, adhiar,* and other tenant of agricultural land, such rights, obligations, or terms shall be enforceable notwithstanding anything contained in the said Act. These notifications have the effect of extending the Bengal Tenancy Act, subject to modifications, to the whole of the Jalpaigori district. The repeal of Act XVI of 1869 (The Bhutan Duars' Act) has had the effect of making the provisions of the Civil Procedure applicable to the Western Duars (Braja Kanta *v.* Tufaun Das, 4 C.W. N., 287).

Darjeeling. Act X of 1859, VI B. C. of 1862 and IV B. C. of 1867 are in force in the district of Darjeeling.

Chittagong Hill Tracts. In Chittagong Hill Tracts there is no special Tenancy Act, but section 18 of Reg. I of 1900 empowers the Local Government to make rules to regulate or restrict the transfer of land, to provide for the collection of rents, to prohibit, restrict or regulate the emigration of cultivating raiyats from one circle to another and to regulate the procedure of officers, and the Government has passed some rules under that section (see *Cal. Gas.*, Pt. I, page 429). Act XXII of 1860 removed the Hill Tracts of Chittagong from the Jurisdiction of tribunals established under the general Regula-

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tions and Acts, but by letter No. 2461 of the 17th April 1867, the Local Government directed the Courts of the Hill Tracts to be guided by the general tenor and spirit of the Civil Procedure Code.

Sonthal Parganas.

In the Sonthal Parganas which are described in the Schedule to Act X of 1857 and in a notification, No. 478, 12th March 1872 (*Gazette of India*, 1872, part I, page 240), the Sonthal Parganas settlement Regulation III of 1872, as amended by Regulation III of 1886, and the Sonthal Parganas Rent Regulation II of 1886 are in force. See also Act XXXVII of 1855 Regulation V of 1893 and III of 1899 and III of 1900. There is no rent law in force in some unsettled areas in Telliaghiree parganas and in certain deerah (Not., 9th December 1879, *Calcutta Gazette* 10th December 1879), and the relations of landlord and tenant in these areas are governed by contract and custom. Section 84 of the Bengal Tenancy Act, has been extended to Sonthal Parganas (Not. No. 771, 20th February, 1897, *Calcutta Gazette*, 24th February 1897.

Chutia-Nagpur.

In Chutia-Nagpur Division, the Chutia-Nagpur Tenures Act (II of 1869 B. C.) prevails. In Hazaribagh, Ranchi, Palamau, and Singbhum districts the principal Tenancy laws are Act I B. C. of 1879 (The Chutia-Nagpur Landlord and Tenants Procedure Act), as amended by Act 1 B. C. of 1903 but in Manbhum and Tributary Mahals, Act X of 1859, Acts VI B. C. of 1862 and IV of 1867 B. C. prevail.

Angul.

There is no special tenancy law in Angul. The laws in force in the Mahal of Angul are detailed in the Schedule to Reg. 1 of 1894, the Angul District Regulation. Section 55 of Reg. 1 of 1894 empowers the Collector to require any proprietor, farmer, rent-collector and occupier of land to furnish information, accounts, and documents, and section 39 directs the tehsildar to exempt the holding of any raiyat from sale for realisation of sums due to the Government unless and until the tehsildar has satisfied himself that the said raiyat has no other property by the sale of which the sum due from him can be realised.

Rent Law in Assam:—Act X of 1859 does not apply to Assam—(Prasidha Narayan *v.* Man Koch, I. L. R., 9 Cal. 330; but see Konaram *v.* Dhatodram, I. L. R.. 6 Cal. 196.) In Sylhet, however, Act VIII of 1869, B.C. does prevail.—See Notification of the 24th February. 1870, (*Cal. Gaz.* of 2nd March. 1870, P. 361); also notification, No. VII of the 22nd August, 1878, (*India Gazette*, of the 12th August, 1878, part I, p. 533).

Repeal.

2. (1). The enactments specified in Schedule I hereto annexed are repealed in the territories to which this Act extends by its own operation.

(2). When this Act is extended to the Division of Orissa or any part thereof, such of those enactments as are in force in that Division or part, or, where a portion only of this Act is so

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extended, so much of them as is inconsistent with that portion, shall be repealed in that Division or part.

(3). Any enactment or document referring to any enactment hereby repealed shall be construed to refer to this Act or to the corresponding portion thereof.

(4). The repeal of any enactment by this Act shall not revive any right, privilege, matter or thing not in force or existing at the commencement of this Act.

Subsection (1): Proceedings Commenced under the former Acts.—The Act came into operation from the 1st November 1885, and from that date the enactments specified in schedule I stand repealed. It, however, does not make any provisions as to the suits and proceedings commenced before it comes into operation. Are they to be governed by the old or the new Act? Act VIII of 1869 (B. C.) provided that "whenever any suit or other proceeding under the provisions of the Acts in the schedule (D) mentioned, or any of them, shall, at the time when this Act comes into operation in any place have been instituted before any Collector or other officer, having, under the provisions of the same Act, or any of them, jurisdiction in such suit or proceeding, such suit or proceeding and all appeals therein shall be heard and determined, and execution of any decree or order therein shall be had, and the practice and procedure shall be such and the same, as if this Act had not been passed" (section 108). The new Act has not a similar provision. We must, therefore, read this Act with section 6 of the General Clauses' Act, which provides: "The repeal of any Statute, Act or Regulation shall not affect any proceedings commenced before the repealing Act shall have come into operation." It has been held by a Full Bench of the Bombay High Court that the words "any proceedings" in the above section included all proceedings in any suit from the date of its institution to its final disposal, and therefore included proceedings in appeal—(Ratan Chand Shri Chand *v.* Hanmantrav Shibakash, 6 Bombay H. C. Rep., 166.) With this view of the section, Garth, C.J., agreed (in Runjit Sing *v.* Meherban Koer and a batch of cases, I. L. R., 3 Calcutta, 662, F. B.; 2 C. L R., 391.) In this case Mr. Justice Jackson observed: "We ought also to hold that section 6 of Act I of 1868 will also cover specific proceedings taken in execution of a decree which have been commenced before the Code came into force, *i. e.*, before the repealing Act became operative. By making this use of the 6th section of the General Clauses' Act and by taking the view which I have taken of the effect of section 3 of the Civil Procedure Code, it seems to me that all difficulty is avoided. The provisions of the Code will then have no retrospective effect so as to injure any right of action or right of appeal existing at the time when the Code came into effect; at the same time that the procedure as intended by the Legislature

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will come into force with all its incidents in every case at the time indicated, that is to say, (1) the procedure in suits instituted after the Code came into force will be wholly subject to its provisions; (2) the procedure in suits commenced before it came into force and pending at that time will be regulated by the previous law up to decree, and by the Code after decree; and (3) the procedure after decree in suits determined before the Code came into force would thereafter be governed entirely by the Code as to new proceedings, but not as to proceedings already commenced, which, according to the view now suggested, are specifically protected by Act I of 1868." This view will apply with modification to the new Act. Suits or execution proceedings of decrees or appeals *commenced before* the 1st November 1885 will be governed by the old Act. And so in respect of decrees obtained before the 1st November 1885 proceedings or appeals *commenced after* the Act came into operation will be governed by the old Act—See Mangal Pershad Dichit *v.* Grija Kant Lahiri, I. L. R., 8 Cal. 51, P. C. in which their Lordships held that all applications for execution of a decree are applications in the suit which resulted in that decree. This is consistent with section 108 of the old Act. So in Behary Lal *v.* Goberdhun, I. L. R., 9 Cal. 446, which, though reviewed, enunciates the principle.—(Compare Obhoy Churn Koondoo *v.* Golam Ali, I. L. R., 7 Cal. 413; Uda Begum *v.* Imamudin, I. L. R, 2 All., 74; Syud Nadir Hossein *v.* Bissen Chand, 3 C. L. R., 437; Elahi Buksh *v.* Marichow, I. L R., 4 Cal 825; 3 C L. R, 593; Chinto Joish *v.* Krishnaji Narayan, I. L. R.. 3 Bom., 214; Narandas *v.* Baj Mancha, I. L. R, 3 Bom., 217; Vidyaram *v.* Chandra Shikaram, I. L. R., 4 Bom., 163; Thakur Pershad *v.* Ashan Ali, I. L. R, I All., 668.) In Huro Sundari *v.* Bhojohari (I. L. R., 13 Calcutta, 86) the question was directly raised. and the Court (Wilson and O'Kinealy, JJ.) delivered the following judgment: "The question raised in this case is whether an appeal lies. The decree appealed against was a rent-decree of such a character that under s. 102 of the old Rent Act (VIII of 1869 B C.) no second appeal would lie to this Court. After the date of that decree, the new Rent Act (VIII of 1885) was passed, and that Act repealed s. 102 of Act VIII of 1869 and substituted other provisions on the subject and, we may take it for the purpose of the present point, that those provisions are such that the present appeal would not be excluded by them. The question whether this appeal lies or not, depends on the construction of s. 6 of the General Clauses' Act (I of 1868). That section says 'the repeal of any Statute, Act, or Regulation shall not affect anything done or any offence committed or any fine or penalty incurred, or any proceedings commenced before the repealing Act shall have come into operation.' The question is whether the words 'any proceedings commenced before the repealing Act shall have come into operation' include an appeal against a decree made before the passing of the repealing Act. If they do, the repealing Act cannot give the right of an appeal in this case. We think that there is clear authority for saying that the word 'proceedings in s. 6 of the General Clauses' Act does include an appeal. In the case of Mangal Pershad Dichit against Girija Kant Lahiri, reported in Indian Law Reports, VIII, Calcutta, page 51, a very similar question was before their lordships of the Privy

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Council with regard to the construction of the Limitation Act (IX of 1871). By s. 1 of that Act, nothing contained in certain portion of the Act was to apply to suits instituted before the 1st of April 1873; and it was held by their lordships that applications for execution in suits instituted before the passing of that Act fall within those terms. Their lordships said: 'It appears to their lordships that a thing which applies to an application in a suit applies to the suit, and that an application for the execution of a decree is an application to the suit in which the decree was allowed.' If an application for the execution of a decree in a suit is a proceeding to the suit, it would seem to follow that an appeal is also a proceeding to the suit, and the word 'proceedings' appears to be quite as wide a word as 'suit.' But on the point before us there are no less direct decisions. In the case of Ratan Chand Shri Chand against Hanmantrav Shibakash, reported in VI, Bombay High Court Reports, page 166, the question was raised in this way: There was an Act in force under which an appeal was given in certain cases. That Act was repealed, and on the date on which it was repealed the decree in question had already been passed but no appeal had been filed and the question was whether on the construction of s. 6 of the General Clauses' Act, the word 'proceedings' in that section included an appeal,—whether, therefore, the appeal lay. The Court held that an appeal was a part of the 'proceedings' and therefore was not affected by the repealing Act. The same view was taken by two Judges, the present Chief Justice and Jackson, J., in a Full Bench of this Court, in a series of cases reported in the Indian Law Reports, 3 Cal. p. 662, and the same view was also taken by a Full Bench of the Allahabad High Court in the case of Thakur Prosad against Asshamally reported in I. L. R., Vol. I. All., p. 66. These cases are on all fours with the present case with this exception, that there an appeal was given under the repealed Acts, and it is held that the repealing Act did not take away the appeal; here the repealed Act did not allow an appeal. It follows on the same principle that the repealing Act cannot give an appeal. We hold therefore that no appeal lies in this case. The appeal will be dismissed with costs." So in Rule No. 734 of 1886 (No. 462). decided on the 20th May 1886, the Court (Mitter and Grant, JJ) observed: "We think that this rule must be made absolute. The application for execution in this case was made before the new Rent Act came into operation. The attachment and proclamation were also made under the old Act. In that state of things, although the sale took place after the new Act came into operation, it does not apply to the present case. Section 6, Act I of 1868, is quite clear upon that point That being so, the Lower Court had no power to set aside the sale under the provision of the new Act The order of the Lower Court will be set aside with costs. But in Rule No. 798 of 1886 (No. 400), decided on the 27th May 1886, the High Court seems to have adopted another view. The Court (Prinsep and Beverley, JJ.) observed:—"Execution of the decree for arrears of rent obtained by the petitioner was taken out on the 6th of January last. The proceedings therefore, in our opinion would be regulated by the Bengal Tenancy Act of 1885. The tenure of the debtor was attached and advertised for sale. A claim was made by third party to have two-thirds of this tenure exempted from sale as having been purchased by him. The

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Moonsiff found that the claimant had purchased one-third and accordingly exempted that one-third share from sale. An objection has been raised under section 170 of the Bengal Tenancy Act to the effect that the Moonsiff acted without jurisdiction. That section provides that the sections of the Code of Civil Procedure under which such an order could be passed shall not apply to a tenure or holding attached in execution of a decree for arrears due thereon. Uuder such circumstances we set aside the Moonsiff's order as without jurisdiction. We make the rule absolute with costs." These cases were reviewed by the Full Bench decision in Debnarain *v.* Narendra Krishna, I. L. R. 16 Cal. 267. In this case a decree for arrears of rent had been passed under Bengal Act VIII of 1869; subsequently after the Bengal Tenancy Act had come into operation, the decree-holder applied for execution, and the tenure, in respect of which the decree for arrears of rent had been made, was attached. The tenure was put up for sale, and a claim was then preferred by a third person, who objected to the execution proceedings. The Munsiff rejected the claim without enquiring into it on the ground that under the provisions of section 170 of the Bengal Tenancy Act no such claim could be preferred. An application was then made to a Division Bench of the High Court to set aside the Munsiff's order. The Division Bench doubted its correctness and referred the following two questions for the decision of a Full Bench —*viz.*, "1. Whether in the present case, the provisions of the Bengal Tenancy Act were applicable to proceedings in execution? 2. Whether the term 'proceedings' in s. 6 of Act I of 1868, does or does not include proceedings in execution after decree?" The Full Bench answered the first of these questions in the affirmative, the second, in the negative and discharged the rule. The judgement in this case was delivered by Wilson, J., who pointed out that the cases in which Courts in this country have had to consider the effect of legislative change in the law upon proceedings instituted before the change was made fall under one or other of three classes: "The first class consists of those in which the Courts have had to construe enactments which have altered the law, not by the mere repeal of earlier enactments, so as to bring the case under s. 6 of the General Clauses Act, but by new affirmative provisions, and in which the new enactments contain in themselves no special rule for their own interpretation. In such cases the Courts have applied the settled rule of construction ordinarily acted upon in the absence of any statutory rule inconsistent with it; and that rule is that retrospective effect is not given to an enactment so as to affect substantive rights, but that provisions affecting mere procedure are applied to pending proceedings. The second class of cases comprises those in which the enactment to be construed provides its own rule of construction by expressly or impliedly declaring that it is or is not to have retrospective operation, or the extent to which it is to affect pending proceedings. The third class of cases consists of those in which the law is changed by a mere repeal of a previously existing law, and the repealing enactment contains no special rule for its own interpretation. Such cases are governed by s. 6 of the General Clauses Act." Wilson, J., then proceeded to consider the cases in which the meaning of the word "proceedings" in section 6 of Act I of 1868, has been discussed and decided, and pointed out that they might be arranged in three groups. The first group consists

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of cases relating to appeals, in all of which, it was said, "there is a completely uniform course of decision to the effect that an aqpeal is a part of the same proceedings, within the meaning of s. 6 of the General Clauses Act, as the things appealed against, and that, therefore, if the thing appealed against is a decree in a suit, the appeal is a part of the same proceeding as the earlier steps in the suit." The second group consists of cases relating to proceedings in execution of decrees. Although proceedings in execution are strictly speaking proceedings in the suit, yet, according to Wilson, J., these cases are authorities "for holding that an application for execution initiates proceedings separate from those which resulted in the decree." The third group consists of cases decided with respect to the Civil procedure Code, and all but one are said to have been based on the terms of the Code itself and not merely on those of the General Clauses Act. In Uma Sundari *v.* Brajanath, I. L. R. 16 Cal. 347, the decree for rent had been passed under Act VIII B. C. of 1869 but execution was not applied for until after the commencement of the operation of the Beagal Tenancy Act, it was held that the execution must proceed under the provisions of the Bengal Tenancy Act. In Lal Mohan *v.* Jogendra, I. L. R. 14 Cal. 136 the decree had been passed and the execution of decree applied for before the Bengal Tenancy Act came into force. In Uzir Ali *v.* Ram Kamal, I. L. R. 15 Cal. 383, the decree had been passed before but execution apqlied for after the Bengal Tenancy Act came into operation. In both these cases, it was held that the judgment-debtor was not entitled to the benefit of s. 174 of the Bengal Tenancy Act, as it conferred a new right. The same view was held in Girish Chandra *v.* Apurva Krishna, I. L. R. 21 Cal. 940, with reference to s. 310 A of the Civil procedure Code by the same process of reasoning. These three decisions were held to have been wrongly decided by the Full Bench in the case of Jugadananda *v.* Amrita Lal, I. L. R. 22 Cal., 767.

The following extracts from Maxwell's interpretation of Statutes (pp. 191-202) may help the reader to some extent on this point:

"Upon the presumption that the Legislature does not intend what is unjust rests the leaning against giving a statute a retrospective operation. It is a general rule that all statutes are to be construed to operate in future, unless from the language a retrospective effect be clearly intended. *Nova constitutio futuris formam imponere debet, non præteritis.* It has been said that nothing but clear and express words will give a retrospective effect to a statute, and that, however much the present tense may be used in it, it must be construed as applying only to future matters. Even a statute which confers a benefit, such as abolishing a tax, would not be construed retrospectively to relieve the persons in the property already subject to the burden before it was abolished. * * *

"It is where the enactment would prejudicially affect vested rights, or the legal character of past Acts, that the presumption against a retrospective operation is strongest. Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imparts a new duty, or attaches a new disability in respect of transactions or considerations already past, must be presumed, out of respect to the Legislature, to be intended not to have a retrospective operation. * * *

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"Where the law is altered pending an action, the rights of the parties are decided according to the law as it existed when the action was commenced unless the new statute shows a clear intention to vary such rights. * * *

Sub-section (3).—Document is "any matter expressed or described upon any substance by means of letters, figures, or marks, or by more than one of those means intended to be used, or which may be used, for the purpose of recording that matter or as evidence of that matter."—(Indian Evidence Act, s. 3; Indian Penal Code, s. 29.) This definition is wide enough to include notifications, rules, or orders made by the Government or the High Court. But suppose there is a document prior to 1st November 1885 in which the parties agree that enhancement of rent will be allowed under the Rent Act then in existence at a certain rate after a fixed number of years, will that document be construed to refer to this Act, and will s. 29 operate as a bar? Literally construed, the sub-section may go to that extent, but I don't think it was the object of the Legislature to cover such a case. See Moheswar Prasad *v.* Sheobaran, I. L. R. 14 Cal. 621.

Sub-section (4):—Regulation XLI of 1793 provided in conformity with English maxims—(1) "that one part of a regulation is to be construed by another so that the whole may stand" (section 19); (2) "that if any regulation differs from a former regulation, either wholly or partially, the new regulation is to be considered as a virtual repeal of the old one so far as it may differ from the latter, provided that the new regulation be couched in negative terms or by its matter necessarily imply a negative" (section 20); and (3) "that if a regulation that rescinds another regulation is itself afterwards rescinded, the original regulation is to be considered as revived without any formal declaration to that purpose" (section 21). The whole of this Regulation was repealed by Act VIII of 1868 save as provided in section I *idem*, q. v. Section 2 of Act V of 1867 (B.C.) provided: "Whenever any Act shall after the time fixed for the commencement of this Act be passed repealing in whole or in part any former Act or Regulation, and such Act shall itself be repealed, such last repeal shall not revive the Act or Regulation or provisions before repealed, unless words be added reviving such Act, Regulation or provisions." So did section 3, cl. 1 of Act I of 1868 provide: "In all Acts made by the Governor-General of India in Council after this Act shall have come into operation for the purpose of reviving either wholly or partially a Statute, Act, or Regulation repealed, it shall be necessary expressly to state such purpose." Section 6 of that Act provided: "The repeal of any Statute, Act, or Regulation shall not affect *anything done* or any offence committed, or any fine or penalty incurred, or any *proceedings* commenced before the repealing Act shall have come into operation." So section 3 of Act V of 1867 (B.C.) laid down: "Whenever any Act shall, after the time fixed for the commencement of this Act (1st June 1867) be passed repealing in whole or in part any former Act and substituting some provision or provisions instead of the provision or provisions so repealed, the provision or provisions so repealed shall remain in force until the substituted provision or provisions shall come into operation by force of the last mentioned Act."

The Interpretation Act of the Bengal Council and the General Clauses' Act.

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S. 6 Act X of 1897 which has now replaced s. 6 of Act 1 of 1868 lays down "where this Act, or any Act, or Regulation, made after the commencement of this Act, repeals any enactment, hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not * * * (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege &c as aforesaid and any such investigation, legal proceeding or remedy may be instituted, continued and enforced, as if the repealing Act or Regulation had been passed."

Definitions.

3. In this Act, unless there is something repugnant in the subject or context :—

(1) "Estate" means land included under one entry in any of the general registers of revenue-paying lands and revenue-free lands, prepared and maintained under the law for the time being in force by the Collector of a district, and includes Government khàs mahàl and revenue-free lands not entered in any register.

(2) "Proprietor" means a person owning, whether in trust or for his own benefit, an estate or a part of an estate.

(3) "Tenant" means a person who holds land under another person, and is, or but for a special contract would be, liable to pay rent for that land to that person.

(4) "Landlord" means a person immediately under whom a tenant holds, and includes the Government.

(5) "Rent" means whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the land held by the tenant:

In ss. 53 to 68, both inclusive, ss. 72 to 75, both inclusive, Chapter XII and Schedule III of this Act, "rent" includes also money recoverable under any enactment for the time being in force as if it was rent.

(6) "Pay," "payable" and "payment" used with reference to rent, include "deliver," "deliverable" and "delivery."

(7) "Tenure" means the interest of a tenure-holder or an under-tenure-holder.

(8) "Permanent tenure" means a tenure which is heritable and which is not held for a limited time.

(9) "Holding" means a parcel or parcels of land held by a raiyat and forming the subject of a separate tenancy.

(10) "Village" means an area included in a village map of the revenue-survey within the same exterior boundary, or, where

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no such maps have been prepared, such area, as any officer appointed by the Local Government in this behalf may determine after local inquiry held on such notice as the Local Government considers sufficient for giving information to all persons interested.

(11) "Agricultural year" means, where the Bengali year prevails, the year commencing on the first day of Bysak; where the Fasli or Amli year prevails, the year commencing on the first day of Asin; and, where any other year prevails for agricultural purposes, that year.

(12) "Permanent Settlement" means the Permanent Settlement of Bengal, Behar and Orissa, made in the year 1793.

(13) "Succession" includes both intestate and testamentary succession.

(14) "Signed" includes "marked" when the person making the mark is unable to write his name; it also includes "stamped" with the name of the person referred to.

(15) "Prescribed" means prescribed from time to time by the Local Government by notification in the official Gazette.

(16) "Collector" means the Collector of a district or any other officer appointed by the Local Government to discharge any of the functions of the Collector under this Act.

(17) "Revenue-officer" in any provision of this Act includes any officer whom the Local Government may appoint by name or by virtue of his office to discharge any of the functions of a Revenue-officer under that provision.

(18) "Registered" means registered under any Act, for the time being in force for the registration of documents.

Unless repugnant:—These words are useful; see the definition of the word "prescribed."

Section 2 of the General Clauses' Act (Act No. I of 1868) provides: "In this Act and in all Acts made by the Governor-General of India in Council after this Act shall have come into operation,—unless there be something repugnant in the subject or context.—

(1.) Words importing the masculine gender shall be taken to include females;

(2.) Words in the singular number shall include the plural, and *vice versa*;

(3.) "Person" shall include any Company, or association, or body of individuals, whether incorporated or not;

(4.) "Year" and "month" shall respectively mean a year and month reckoned according to the British Calendar;

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(5.) "Immoveable property" shall include land, benefits to arise out of land and things attached to the earth, or permanently fastened to anything attached to the earth.

(6.) "Moveable property" shall mean property of every description, except immoveable property;

(7.) "Her Majesty" shall include Her heirs and successors to the Crown;

(8.) "British India" shall mean the territories for the time being vested in Her Majesty by the Statute 21 and 22 Vict., cap. 106 (*An Act for the better Government of India*) other than the Settlement of Prince of Wales' Island, Singapore, and Malacca;

(9.) "Government of India" shall denote the Governor-General of India in Council, or during the absence of the Governor-General of India from his Council, the President in Council, or the Government of India alone, as regards the powers which may be lawfully exercised by them or him respectively;

(10.) "Local Government" shall mean the person authorized by law to administer executive Government on the part of British India in which the Act containing such expression, shall operate, and shall include a Chief Commissioner;

(11.) "High Court" shall mean the highest Civil Court of appeal in such part;

(12.) "District Judge" shall mean the Judge of a principal Civil Court of original jurisdiction but shall not incude a High Court in the exercise of its ordinary or extraordinary original Civil Jurisdiction;

(15.) 'Section' shall denote a section of the Act in which the word occurs;

(16.) 'Will' shall include a Codicil, and every writing making a voluntary posthumous distribution of property;

(17.) "Oath," "swear," and "affidavit" shall include affirmation, declaration, affirming and declaring in the case of persons by law allowed to affirm or declare instead of swearing;

(18.) "Imprisonment" shall mean imprisonment of either description as defined in the Indian Penal Code;

(19.) And in the case of any one whose personal law permits adoption, "son" shall include an adopted son, and "father" an adoptive father."

Subsection (1); Estate:— "We have defined 'estate' to mean land included under one entry in any of the general registers of revenue-paying and revenue-free lands. It thus means the interest immediately below the paramount interest which Government has in the land" (R. R. C.); and in the case of khàs mehàls, 'estate' means the paramount interest itself. "Estate" is defined in section I of Act VII of 1868 (B.C.) to "mean any land or share in land subject to the payment to Government of an annual sum in respect of which the name of a proprietor is entered on the Register known as the General Register of all revenue-paying estates, or in respect of which a separate account may, in pursuance of section 10 or section 11 of the said Act XI of 1859 have been opened." In s. 3 of Act VII B. C. of 1876, "Estate" includes (*a*) any land subject to the payment of land-revenue, either immediately or prospectively, for the discharge of which a separate engagement has been entered into with Government: (*b*) any land which is entered on the revenue-roll as separately assessed with land revenue (whether

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the amount of such assessment be payable immediately or prospectively) although no engagement has been entered into with Government for the amount of revenue so separately assessed upon it as a whole: (*c*) any land being the property of Government, of which the Board shall have directed the separate entry on the general register hereinafter mentioned." Compare also section I, Act IV of 1870(B. C.), section 3 of Act VI of 1873 (B. C.), section 4 of Act VIII of 1876 (B. C.). In section 3, clause I of Act XVIII of 1873 (Rent, N. W. Provinces) "Mahal" means—(*a*) "any local area held under a separate engagement for the payment of land revenue, or for which a separate record of rights has been framed; (*b*) any local area of which the revenue has been assigned or redeemed and for which a separate record of rights has been framed." Under sec. 4 of the Land Registration Act, 1876, the Collector of every district is bound to prepare and keep up the following registers: A.—A general register of revenue-paying lands; B.—A general register of revenue-free lands; C.—A mauzawar register of all lands revenue-paying and revenue-free; D.—An intermediate register of changes affecting entries in the general and mauzawar registers. This Act therefore becomes the rent law for Government estates, and estates under the management of the Court of Wards, as for ordinary estates. It repeals Act VIII of 1879 B. C., and the only advantage that the Government and the Court of Wards now possess over private zemindars, is the certificate procedure of Act VII of 1868 B. C. (section 195 of this Act).

General registers.

Khas Mahal.

It should be noted that unregistered revenue-free land is now included in "estate." By section 13 of the Land Registration Act, 1876, the Board of Revenue are empowered to exempt revenue-free lands from registration in any district, if it thinks the circumstances are such as to make their registration impracticable; and the Board have so exempted from registration revenue-free lands containing an area of less than 2 acres in Cuttack, Balasore and Puri. (Board's C. O., 2nd May 1900).

Unregistered lakhiraj.

Subsection (2); Proprietors:—The definition is so drafted as to include *estates held in trust*, but *not tenures* except revenue-free lands which are within the definition of "estate." "Proprietor" also includes District Boards and other local bodies owning land in trust or for their own benefit. As the word "person" includes "any Company or Association or body of individuals, whether incorporated or not" [see the General Clauses Act, I of 1868, section 3 (3) - since repealed re-enacted in the General Clauses Act X of 1897, section 3 (39)], and it includes District Boards and similar bodies. When such bodies own lands that are entered in their names in the Collector's registers under separate numbers as estates, they are "proprietors" as regards lands so entered. The *Noabad talukdars* of Chittagong never had, or claimed or have, a right to *malikana*, and, on the other hand, the Government had no right to fix the amount payable by them to it at any amount it thought fit. It has therefore been declared by the Government of India that these *Noabad talukdars* are to be regarded, not as proprietors, but as tenure-holders, their rights and obligations being governed by the provisions of the Bengal Tenancy Act relating to tenures. Their rents can only be enhanced

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now in accordance with the provisions of this Act; they are not liable to have their tenures leased out to others or taken into *khas* possession by the Government, for recusancy, as proprietors are; and they can only be ejected by an order of a Civil Court. But on the other hand, they are not entitled to receive *malikana* from the Government, as proprietors of temporarily settled estates are, should they refuse to accept the rents settled for them. (See Government of India letter to the Bengal Government No. 1792-173, 24th July 1893). For similar reasons, it would appear that tea planters in Jalpaiguri, and lessees of waste lands, under the Arable Waste Land Rules, are not "proprietors." They are entitled to renewal of their leases or certain terms specified in the leases themselves, but should they refuse to accept renewal on these terms they are not, as a rule, entitled to *malikana*. They are, ordinarily, tenure-holders whose rights and obligations are regulated by the provisions of the Bengal Tenancy Act, where it is in force, or by so much of the Act as is in force where the lands are situated, subject, however, to the conditions of their leases, where the leases were given before the commencement of the Act, and to those conditions so far as they are consistent with the provision of the Act, where the leases were given after the commencement of the Act [see sections 7 and 10 and 178 (3), provisos (i) and (ii), *post*]. When the tea planters of Jalpaiguri and lessees under the Waste Land Rules do not come under the definition of "tenure-holder" in section 5 (1) *post*, they are *raiyats* under this Act. In some cases lessees of waste lands in the Sunderbans under the old Waste Land Rules of 1853 claim that they are entitled to *malikana* should they refuse to engage, on the terms offered, on the expiration of their leases. Such lessees of waste lands in the Sunderbans as are, under the terms of their settlement entitled to *malikana* (if there be any) are apparently "proprietors" under this Act.

Subsection (3); Tenant:—This is a new attempt. The owner of an estate is termed a proprietor. The interest next below an estate and superior to that of a raiyat belongs to a tenure-holder, and below him is the under-tenure holder of different grades, and we then get down to the raiyat, but all of these, from the tenure-holder to the raiyat inclusive, are tenants. The person under whom the tenant holds need not be the proprietor or the owner of the land, so that if a person holds by payment of rent under a trespasser or under one who has no title to the land, his status as a tenant still obtains. Accordingly it has been held that the mere fact that the person to whom a raiyat has for some years paid rent had no title to the land, his status as a tenant still obtains. Accordingly it has been held that the mere fact that the persons to whom a raiyat has for some years paid rent had no title to the land cannot take away from him the character of a raiyat.—(Syud Ameer Hossein *v.* Sheosahi, 19 W. R., 335.) A person having previously to the passing of the Bengal Tenancy Act, been settled on certain land as a raiyat and tenant by a trespasser, and having acquired no right of occupancy at the time of suit brought, was in 1888 sued in ejectment by the true owner, who had obtained possession of the land from such trespasser through the Court on the 27th January 1886. *Held*, that such person was a non-occupancy-raiyat within the meaning of s. 5, sub-section 2 of the Bengal Tenancy Act, and was protected from ejectment by that Act.—Mohima Chunder Shaha *v.* Haizar Pramanic, I. L. R., 17 Cal., 45, approved; Binad Lal Pakrashi *v.* Kalu Pramanik,

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I. L. R., 20 Cal., 708. So a raiyat occupying and cultivating land for more than twelve years under a landlord who has no title to the land nevertheless acquires a right of occupancy.—(Zoolfun *v.* Radhika Prosunno, I. L. R. 3 Cal., 560.) But the tenant must be holding *bonâ fide* and must not be in collusion with the trespasser or the person under whom he holds, otherwise he would be treated as a trespasser. The word "proja" does not define the status of a tenant.—(Kadarnath *v.* Sookoomari, 22 W. R., 398.) See subsection 5, Rent. The defendants were cultivating raiyats who had held certain land under Government for a period suffisient to give them a right of occupancy. The plaintiffs in a suit against Government succeeded in proving their title to the land. In a suit to eject the defendants as trespassers, inasmuch as they could have derived no title from Government, who had no title, and no relationship of landlord and tenant existed between them and the plaintiffs who had not recognised their right to cultivate the lands: *Held* that, under s. 3 (5) sp. 5 cl. (2) and (3), of the Bengal Tenancy Act, the defendants were occupancy raiyats and therefore not liable to ejectment, except for the reasons and on the conditions mentioned in the Act and no such reasons or conditions existed in this case. Liability to pay for "cultivation" of land by a person between whom and the proprietor of such land there is no relationship of landlord and tenant, is a "liability to pay rent" within the meaning of the Bengal Tenancy Act. Clause (3), s. 5 of that Act is intended merely to define a raiyat in respect to a proprietor or tenure-holder, and to distinguish him from a tenant described as an under-raiyat.—Mohim Chandra Shaha *v.* Hazari, I. L R., 17 Cal., 45.

But for special contract.

This covers jungleboori tenants and quit rent-holders, and holders of service tenures. For meaning of 'land,' see notes under subsection 5 (Rent), and s. 20 *post*. According to the rulings of the High Court before the Bengal Tenancy Act was passed, Act X of 1859 and Bengal Act VIII of 1869 did not apply to land let mainly for building purposes, or for *basars* or *ghats*, or for mining purposes:—Jadunath *v.* Schoene, Kilburn & Co., I. L. R. 9 Cal. 671; or for quarrying purposes; or to lands let in towns for other than agricultural or horticultural purposes;—Ranigunge Coal Association *v.* Jadunath, I. L. R. 19 Cal. 489; Umrao Mahamad Lyli, I. L. R. 27 Cal. 205; see notes to section 19, *post*. Under the definition of "tenant" a *lakhirajdar* holding land from a proprietor rent-free is a "tenant." The term *lakhirajdar* is commonly applied (*a*) to owners of revenue-free lands, and (*b*) to holders of land granted rent-free by proprietors or tenure-holders. The former *lakhirajdars* are proprietors of estates, and the latter are tenants, for they are not entered in the Collector's registers as owners of estates, and they would be bound to pay rent to the proprietors in whose estates the lands are included, but for the special agreement with the proprietor or tenure-holder who granted the land rent-free. *Lakhirajdars* holding rent-free may also be trespassers, if they occupied the land rent-free without permission of the proprietor or tenure-holder and without any agreement, express or implied. *Lakhirajdars* who hold from proprietors or tenure-holders may be tenure-holders, under tenure-holders, or *raiyats*, according as they fall under any one of the

Land.

Lakhirajdar.

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definitions of these terms in the Act, while those who hold from the Government free of land-revenue are "proprietors."

Subsection (4): Landlord:—In Act XVIII of 1873, section 3, clause 3, *landholder* "means the person to whom a tenant is liable to pay rent." It seems that a proprietor is not necessarily a landlord nor *vice versâ*, and that 'landlord' being a correlative of 'tenant' has as many grades in it as there may be in the 'tenant'.

Subsection (5): Rent: In Warren's Blackstone, rents are described as incorporeal property. It is worthy of remark that according to English law rent is something issuing out of the thing demised, but differing from it in nature, and not part of the thing itself, for that would not be a *reservation*, but an *exception*. Thus a reservation to the owner of the land, of its vesture or herbage would not be good—See *Smith's Law of Landlord and Tenant*, 2nd ed., p. 115, and authorities there quoted. "Rent is defined by Chief Baron Gilbert in his *Treatise on Rents*, p. 9, to be an annual return made by the tenant, either in labour, money or provisions in retribution for the land that passes, from which you will observe that, though rent is usually reserved in money, it need not be so: or even in those other things mentioned by Gilbert, but which are only given as examples. It may, as is said by Lord Coke (1 Inst. 142, *a*), consist of spurs, horses, or other things of that nature, or of services or manual labour; as, to plough a certain number of acres for the landlord yearly." (Woodfall, 111.) In Coke upon Littleton 142 *a*. of Rent Service, it is said: "The rent may as well be in delivery of hens, capons roses, spurs, bows, &., or any other profit that lies in render, office, attendance, and such like, as in the payment of money." *Rent* in Act XVIII of 1873 "means whatever is to be paid, delivered or rendered by a tenant on account of his holding, use, or occupation of land." In the draft bill of the Rent Commission, the definition was rather profuse and defective. "The definition of rent," they reported, "presented some difficulty as opinions differ about what rent really is in India. We have endeavoured to express what we hope will be accepted as a reasonable view of the subject, and have defined rent to be 'whatever is payable or deliverable by a tenure-holder, under-tenure-holder, or occupancy raiyat to the proprietor, tenure-holder or under-tenure-holder, possessing the interest immediately superior in the land held by him, in recognition and satisfaction of such superior interest; or whatever is payable or deliverable as a return or compensation for the use or occupation of land or for any rights of pasturage, forest rights, fisheries, or the like.'" In Field's Digest of the Rent Law, *rent* was defined to mean "whatever is periodically payable or deliverable, as a return or compensation for a tenure or under-tenure, or for the use or occupation of land, or for any rights of pasturage, forest rights, fisheries or the like." It will be observed that, while under the definition of Act XVIII of 1873, service rendered for use or occupation of land would be rent, under the definition of this Act it would not be so. Whatever is *payable or deliverable* is *rent* under this Act, but not whatever is *rendered*. This, however, would not place the holder of a service-tenure beyond the category of a tenant, because in each case the service required would be a matter of special contract in lieu of rent, and the

Lawfully payable or deliverable.

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words "but for a special contract would be liable to pay rent" in the definition of a tenant would apply to the holder of a service-tenure. Where, however, the original donee of a service-tenure ceases to do any service and pays in lieu a rent which his descendants continue to pay, the conditions of the tenure becomes altered from service to rent—(Rajah Mohendra *v.* Jokhu Sing, 19 W. R., 211 P. C.). The mere fact of long possession of a service-tenure or no rent at all, again does not give the holder any exemption from the payment when the service is no longer required or performed—(Chundernath *v.* Bheem Sirdar, W. R. Sp., Act X, 37). The distinction between "lawfully payable" and "lawfully recoverable" in the sense in which some commentators have drawn it is absurd. The word "payable" is only a correlative term to the word "recoverable," and whatever is payable by the tenant is recoverable by the landlord. But the converse case is not true; whatever is recoverable by the landlord may not be rent under this definition; for instance, *dak cess*, by contract. The true distinction therefore is whatever is payable by the tenant to the landlord for use and occupation of land is 'rent' and recoverable by the landlord under this Act, but whatever is recoverable by the landlord may not be 'rent' because it does not fall under the terms of this definition and is therefore not recoverable under the Act as rent. The obligations for payment or delivery must arise out of a lawful action. Whatever is therefore payable as damage, *i. e.* for torts or unlawful actions, would not be rent. Hence it has been held that a suit for damage for the occupation of land by the defendant without the consent of the plaintiff is not a suit for rent cognizable by the Revenue Court—(Bhoobun Mohun *v.* Chundernath, 17 W. R., 69; Kali Krishna Tagore *v.* Iyzatunnisa, 1 C. W. N. lxxviii. So a suit which is in reality a claim for compensation for use and occupation of lands, cannot be described as a suit for arrears of rent—(Kishen Gopal *v.* Burnes, I. L. R., 2 Cal., 374). "It appears," observed Markby J., in this case, "that the raiyat has in addition to the original 67 bighas and odd cottas of land, of which the nugdi portion of the tenure consisted, taken into his possession two bighas more. Now in suing the tenant in respect of the rent of these two bighas, the landlord does not treat these two bighas as an addition to the major tenure held upon the same terms as the rest of the nugdi tenure. He chooses to place on these two bighas a rent of Rs. 5, which is more than the rate at which the nugdi tenure is assessed. It is not shown that the rent has ever been paid by the tenant. The suit, therefore, in reality, so far as it relates to these two bighas is a suit to recover compensation for the use and occupation of those two bighas." Damages on account of wanton destruction of trees, though stipulated for in a kabuliyat cannot be claimed as rent—(Nobo Tarini *v.* Gray, 11 W. R., 7). Nor goats, straws and other articles due under a separate agreement unconnected with the question of rent (Bhabasundari *v.* Jynal Abdin, 8 W. R. 393). But a stipulation to supply a number of mangoes yearly is one to pay part of the rent in kind, and the value of the mangoes is realisable as rent under the Rent Law.—Nobo Tarini *v.* Gray, 11 W. R. 7; a suit for the landlord's share of the produce or its money is a suit for rent.—Bhabasundari *v.* Jynal Abdin, 8 W. R. 393; Prezuradston *v.* Madhu Sudan, 2 W. R. 15 F. B.; W. R., F. B. 48; 1 Hay, 350; Marshall, 151; Luchman Prasad *v.* Hulash, 11 W. R. 151; Jamna Das *v.* Gansi Mian, 21 W. R. 124; Shoma

Rent in kind.

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Mehta *v.* Rajani Bisvas, 1 C. W. N. 55. A stipulation to supply a number of mangoes yearly is one to pay part of the rent in kind, and the value of the mangoes is realisable as rent under the Rent Law.—*Ib.* So also under Act VIII of 1869, B.C. —(Mullick Amanut *v.* Ukloo, 25 W. R., 140.) Collections of portions of the proceeds of sales from persons exposing their goods for sale in a *hat* and due under a farming lease are rent, because they are payable for the use of the land;—Bangshodhur *v.* Mudho, 21 W. R. 383; Gaitri Debi *v.* Jhakondas, W. R., Sp., Act X, 78; & contra Savi *v.* Ishar Chandra, 20 W. R. 116; Certain payments which are not so much in the nature of cesses as of rent in kind and which were uniform, and had been paid by the raiyat from the beginning according to local custom, were held not to be illegal cesses but rent.—(Judhnarawan *v.* Juggeswar Dayal, 24 W. R., 4.) Abwabs are, however, unlawful (see s. 74, *post* and notes), and cannot be recovered as rent. If a raiyat, for the purpose of preventing disputes with his landlord, agrees to make a definite payment to the landlord in addition to his rent, the additional payment cannot be treated as an illegal cess, for s. 3, Reg. V of 1812 rather favours such arrangements and provides for their being enforced.—(Serajgunge Jute Company, Ld. *v.* Torabdee Akoond, 25 W. R., 252.) So a *purabee* was held not to be in the nature of an abwab or illegal cess, but as part of the legal consideration for a contract.—(Juggodish *v.* Turikulla Sircar, 24 W. R., 90.) So if a zemindar demand a cess over and above the original rent, and the raiyat consents and contracts to pay it, this demand and the old rent form a new rent lawfully claimable under the contract.—(Jeeatoollah *v.* Jugodindra Narain, 22 W. R., 12.) It is doubtful whether these decisions will hold good on the present law. See the whole question discussed under s. 74. Where simultaneously with the execution of a pottah, and the giving of a kabuliyat by the defendant, the defendant entered into a separate agreement by which he undertook to deliver to the plaintiff a certain number of goats, certain quantities of straw and other articles yearly, it was held that this was a special agreement wholly unconnected with the question of rent, and a suit for breach of the agreement was cognizable by the Small Cause Court.—(Bhobun Sundari *v.* Nawab Abdin, 8 W. R., 393.) But if not barred by s. 74, are not these articles deliverable for use and occupation of land and therefore rent?

Abwabs.

Rent presupposes the relation of landlord and tenant. The thing payable or deliverable must be paid or delivered by the tenant to his landlord. A suit for *dasturat* is not, therefore, a suit for rent and not cognizable under Act VIII of 1869, B. C.—(Ram Churan *v.* Torita Churan, 18 W. R., 343.) In this case Kemp, J., delivered the following judgment: "The first point for decision is whether *dasturat* is rent or not. * * * * *Dasturat* is explained in Wilson's Glossary to be an 'allowance for expenses of collections granted by the Mahomedan Government.' The decision of the late Sudder Court, which was referred to during the argument, is to be found at page 504 of the Decisions of 1854. The Court in a judgment of a few lines held that *dasturat* was not a cess, such as is prohibited by s. 55 of Reg. VIII of 1793, but that the term 'seemed to imply a reservation of a certain

By a tenant to his landlord.

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annual payment by the purchaser of the talook to the seller, the original proprietor of a small sum.' The Court did not hold that *dasturat* was rent. The letter of the Sadar Board of Revenue shows that *dasturat* was 'never paid.' They were of opinion that the term seemed to imply a certain annual payment by the purchaser to the seller, the original proprietor of a small sum. * * * * We concur with the Judge in holding that the relation of landlord and tenant as between the plaintiff and defendants is not made out, and that these suits are not cognizable under Act VIII of 1869 (B. C.)" A claim for *huq-i-semindari* is not a claim for rent.—(Jowahur Laul *v.* Sultan Ali, 12 W. R.. 214.) By a deed between *A* and *B*, *B* purchased from *A*, fractional share of a purgunnah, the Government revenue payable on which was Rs. 43-12, and it was stipulated that *B* was to apply to the Collector for mutation; and that until the mutation was completed, he should pay the above quota of the Government revenue through *A*; and that after mutation, the relation between *A* and *B* should be an independent one. *Held*, that the relation of landlord and tenant was not created by the deed, and the quota of revenue payable by *B* under the deed is not rent.—(Golab Chundra Roy, 16th September 1862.) Though, as a general rule, a mortgagor and mortgagee do not stand in the relation of landlord and tenant, yet when the mortgagee executes a lease in favour of the mortgagor stipulating to pay him a certain amount annually as rent, he is, as far as the payment of that sum is concerned, a tenant of the mortgagor, and must be sued for any arrears of such rent under Act X of 1859.—(Bishen Rup Dutt, 30th June 1864; Sp. W. R. Act X, 93.) *B* obtained a lease of certain lands from *A* agreeing thereunder to pay to *A* certain rental for the land, and also a sum of Rs. 183, 6 annas 3 pies yearly to *A's* superior landlord, obtaining a receipt therefore. *A* sues *B* for the rent due to himself, and for the sum due to his superior landlord. *Held* that *A* was entitled to recover the sum due to his superior landlord as damages for breach of the contract and that the amount of such damages ought not to be taken as nominal but should be assessed on the footing of the sum for which *A* might become liable to his superior landlord. The Court observed that 'rent cannot be made payable as such to a third person.'—(Woodfall, 12th ed., 355; Little, s. 346; Rutnessur *v.* Harrish Chander, I. L. R., 11 Cal., 221.) But in *Mahabat Ali v. Mahomed Faizullah* (2 C. W. N., 455), it was subsequently ruled that a sum payable by a *patnidar* on behalf of the *semindar* to the Collector as cesses, and another payable to a third person as expenses for the maintenance of a *masjid*, were sums payable for the use and occupation of land, and were, therefore, rent. The conflict between these two decisions was settled by a Full Bench in *Basanta Kumari Debia v. Asutosh Chakravartti*, (I. L. R., 27 Cal., 67; 4 C. W. N., 3) in which it was decided that a suit by a landlord against a tenant for a certain sum of money payable by him out of the rent to a third person under assignment is one for rent and not for damages. In this case the assignee was not a party to the assignment and had not accepted it, which was regarded as showing that " in the contemplation of the parties the money did not cease to be a part of the rent or recoverable as such." So, where a lease had been executed by the plaintiffs in favour of the defendant at a fixed annual rent and the defendant under instructions from the plaintiffs paid from time to time Government

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revenue, cesses, expenses of litigation, &c, on their behalf and used to set off those sums against the rent due to them under the lease, it was held that on the expiry of the lease, the plaintiffs could not sue the defendant for an account, but only for rent, if any was still due (*Bhekdhari Lal v. Badhsingh Dudharia,* I. L. R., 27 Cal., 663). In *Mansar v. Loknath Nath Rai* (4 C. W. N., 10), it was held that a suit brought for rent by an assignee of a landlord against a tenant was still a suit for rent, and was, therefore, excluded from the jurisdiction of the Small Cause Court. "The money was due as rent at the time of the assignment, and the assignment did not deprive it of that character, so far at all events as the tenant was concerned." This view was adopted by the Full Bench in the case of (*Srish Chandra* v. *Nachim Kazi*. I. L. R., 27 Cal., 827; 4 C. W. N., 357 F. B.) but Bannerjee, J., dissented from it holding that where the landlord's interest in the land is not assigned along with the arrears of rent after they fell due, a suit by the assignee for the recovery of the same is a suit for ordinary debt. The full Bench decision was followed in *Mohendra Nath Kalamori* v. *Kailash Chandra Dogra*, 4 C. W. N., 605, in which a second appeal in a suit brought by an assignee of arrears of rent was allowed, being held not to be barred under the provisions of s. 586 C. P. C.

On account of the use or occupation of land.

The nature of the 'use' or "occupation" or of 'land' has not been defined. Obviously, however, the use or occupation must be confined to the class of tenants specified in section 4 *post,* and not to any other classes of tenants, and the land must be such as held by a tenure-holder or raiyat or under-tenure-holder or under-raiyat. "Land" in this section does not moreover include homestead land, or pasturage, or forest rights, or fisheries, or the like; sections 184 and 193 *post* provide for such classes of land. If 'rent' as defined in this section included rent for pasturage, &c., or for homestead, sections 182 and 193 would have been redundant. Section 1 of Act V of 1867 (B. C.) declares that "in all Acts passed by the Lieutenant-Governor of Bengal after its commencement, the word 'land' shall include houses and buildings and corporeal hereditaments and tenements of any tenure, unless where there are words to exclude houses and buildings or to restrict the meaning to tenements of some particular tenure." The Bengal Tenancy Act being an Act of the Governor-General in Council, this definition will not suit it; and the General Clauses' Act I of 1868 does not define land, though immovable property is defined, which "includes lands, benefits to arise out of land and things attached to the earth, or permanently fastened to anything attached to the earth." The draft Bill of the Rent commission, however, gave the following definition: "Land includes woods and waters thereupon: when applied to land cultivated or held by a raiyat, it means land used or intended to be used for agricultural or horticultural purposes, or the like. In Chapter XVIII it means (*a*) tenures, under-tenures and holdings; (*b*) land used or let to be used for agriculture, horticulture, pasture or other similar purposes, or for dwelling houses, manufactures or other similar buildings; and (*c*) rights of pasturage, forest rights, fisheries, and the like. *Explanation*—Bastu or homestead land is land used for agricultural purposes when it is occupied by a raiyat, and together with the land cultivated by such raiyat forms a single holding."

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The definition was abandoned. The nature of the use or occupation, or the nature of the land being not defined, unless the construction based upon sections 182 and 193 (referred to above) be adopted, the use or occupation of land by erecting a house thereupon, or by holding a market, or by digging a tank, would clearly fall under the definition here given. But the use of the house itself, or the tank itself, can only be by a straining of the language considered as use or occupation of *land*. That is, the rent of the *site* of the houses or tank, the erection or digging of which are only different modes of using the *land* where they are situate, would be *rent* under this definition, but not the rent of the house itself, as in the case of a lodger or the rent of the tank itself, as in the case of a fisherman who rents it for the purpose of fishing. There were contradictory decisions under the old law as to what 'land' under Act X of 1859 or Act VIII of 1869 B. C. meant. It was, latterly held, that the word "land" in Act X, 1859, or Act VIII of 1869 (B. C.) means agricultural or horticultural land, and that the provisions of the Rent Law do not apply to a suit for arrears of rent, where the land is occupied for the purpose of building and not agriculturally.—(In the matter of Bromomoyee Bewa, 14 W. R., 252, *per* L. S. Jackson, J.) Lands used for other purposes than for purposes of agriculture and horticulture are not the subject of legislation in Act X of 1859 or Act VIII of 1869 (B. C.).—(Stalkart *v.* Mudun Mohan, 17 W. R., 441; 9 B. L. R., 97; Ramdhun *v.* Haradhan, 12 W. R., 404; Kalee Mohan *v.* Kalee Kista, 11 W. R., 183; 2 B. L. R., App. 39; Church *v.* Ram Tanoo, Id., 547; 9 B. L. R., 101; Ranee Swarnamayi *v.* Blumhardt, 9 W. R., 151; Purna Chunder *v.* Sadut Ali, 2 C. L. R.) In th Full Bench decision in Ranee Durga Sundari *v.* Bibi Omedunnessa (18 W. R, 235, F. B.; 17 W. R., 151), the Court held that lands used for building purposes were not the subject of legislation in Act X of 1859 or Act VIII (B. C.) of 1869. Couch, C. J., observed: "But I think that in determining what is the meaning of 'land' and 'holding land' in Act X, we must look at all the provisions of the Act. It may be assumed that it was not intended that one part of it should apply to one kind of land, and another part to another, and that land in s. 23 should have a different meaning from what it has in other sections. The Deputy Collector says with truth that it is extremely difficult to apply to bazar lands occupied merely as building ground the provisions of s. 17 which are manifestly intended to be applied to the rent of lands used for agricultural purposes. And these are not the only provisions in the Act of which that may be said. Section 112 and the following sections can only apply to land used for cultivation. The intention of the Legislature is to be deduced from the whole Act, and a construction which makes the whole of it consistent to be preferred. I think this is the ground of the decisions in this Court that lands used for building purposes are not liable to enhancement under Act X of 1859." It is worth while to note that Mr. Justice Dwarka Nath Mitter dissented from this view but was over-ruled. Since the Full Bench decision, it has been held, that a suit for arrears of rent on account of land used for building purposes is cognizable by the Mofussil Courts of Small Causes.—(Peary Bewa *v.* Nukoor, 19 W. R., 398; Gokul Chand *v.* Mosahroo, 21 W. R., 5). In a suit for rent of land, where the principal subject of the entire occupation is *bastu* land, the residue (if any) of the holding being

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merely subordinate, the Small Cause Court has jurisdiction. But when the principal subject is agricultural land, the building or buildings being more accessories thereto, the Small Cause Court will have no jurisdiction—(Musst. Ranee Chandewari *v.* Gheena Panday, 24 W. R., 152). But a suit for arrears of rent at an enhanced rate in respect of land situated in a town, and upon which either a house or shop stands, is not a suit for rent within the meaning of s. 6, Act XI of 1865, and is maintainable in the Ordinary Civil Courts, and not in the Small Cause Court.—(Joy Kishore *v.* Nubee Buksh, 17 W. R., 175).

Recoverable under any enactment as rent.

The words "recoverable &c." refer to Road and Public Work Cesses payable under Act XI (B. C.) of 1880 (s. 47), and Embankment Cess payable under Act II (B. C.) of 1882 (s. 74) and Survey Cess payable under Act V (B. C.) of 1875 (s. 38). A registered lease granted for building purposes and for establishing a coal depôt does not come within the purview of the Bengal Tenancy Act, not being a lease for agricultural or horticultural purposes. The limitation applicable to a suit for the rent reserved in such a lease is that prescribed by Art. 116 of the Limitation Act.—(Raniganj Coal Association, Limited *v.* Judoonath Ghosh, I. L. R., 19 Cal. 489). Dâk Cess is not recoverable as rent under the Dâk Act (see Act XIV of 1866, and Act VIII of 1862, B. C.); but if there be a contract for its payment between the zemindar and any person holding under him, s. 12 of Act VIII (B. C.) of 1862 saves it. Still the contract would not make the cess to be rent, and claim for it would be cognizable by the Small Cause Court. Moreover that section saves only a contract between the zemindar and an under-tenant, but not between an under-tenant or raiyat. As, however, Dâk Cess is not an abwab, s. 74 of this Act will be no bar to its recovery, the ordinary laws of contract protecting it. (*See* notes under s. 74.) Cesses, though recoverable as rent under the provisions of the Cess Act, are yet not rent, as they are not payable for the occupation of land under the terms of the 2nd para of Subsection (5), they are only included under the term rent in sections 53 to 68, 72 to 75 and Chapter XII and section III of this Act. So also for the purposes of s. 153 of this Act,—Mohesh Chandra *v.* Umatara, I. L. R. 16 Cal., 638; Rajani Kanta *v.* Jagissar, I. L. R. 20 Cal., 254; similarly it has been held that a decree for arrears of cess is a decree for rent and s. 174 applies.—Kishori Mohan *v.* Sarada Mani, C. W. N. 30. Patwaris' dues are of course not rent, and, therefore, cannot be recovered under the provisions of this Act, but they are recoverable by the same processes as arrears of public revenue under sec. 36 of Reg. XII of 1817. Dak cess is also not rent. Under sec. 12 of the Zemindari Dâk Act, VIII, B. C., of 1862, contracts or engagements for the payment of dak cess may be made by any *zemindar* with any person holding under him (see *Saroda Sundari Debya* v. *Uma Charan Sarkar*, 3 W. R., S. C. Ref., 17; *Bissonath Sarkar* v. *Sarnamayi*, 4 W. R., 6; *Rakhal Das Mukhurji* v. *Sarnamayi*, 6 W. R., 100); but this would not appear to make dak cess rent, or recoverable as such. In *Watson* v. *Srikrishna Bhumik* (I. L. R., 21 Cal., 132), however, it has been held there where dak cess is claimed under the contract by

Dak cess.

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which rent is payable, it must be regarded as rent, because it is claimed practically as part of the rent. Chaukidari tax, would not seem to come within the definition of rent, but in *Ahsanullah v. Tirtha Bashini* (I. L. R., 22 Cal., 680), which was a suit for arrears of chaukidari tax, payable by a *patnidar* under the *patni* settlement, it was held that the amount for which he was thus liable was rent. Interest is not rent within the meaning of the term as defined in this Act (*Kailash Chandra De v. Tarak Nath Mandal*, I. L. R. 25 Cal., 571).

For the purposes of Acts VIII of 1869 B. C. & X of 1859 rent comes within the terms "property," & "movable property."—(Mohesh Chundra *v.* Guru Prosad, 13 W. R. 401).

Subsection (6): Pay and payable.—This is taken from Kissen Gopal Marwar *v.* Burnes, I. L. R., 2 Cal., 374. "Now the word *rent* undoubtedly includes both rent in kind and rent in money. But the word *paid* does at first sight suggest rent reserved in money. But when we turn to section 2, Act VIII of 1869 (B. C.), it is clear from that, that the Legislature did not use the word *paid* in reference to rent reserved in money only, because in section 2, we find the expression, 'if the rent is payable in kind,' thereby clearly showing that the Legislature at any rate considered that the word *paid* or *payable* was a proper expression for the proportionate produce which have to be delivered in kind, or a *bhaoli* tenure," *per* Markby, J.

Subsection (7): Tenure:—See notes under s. 5 (post).

Subsection (8): Permanent Tenure:—Read with sections 11 and 10 of the Act and also with sections 12 to 17. Hence a permanent tenure is not only heritable but transferable under the Act. This, however, is not always the case, *e.g.*, a *ghatwali* tenure is permanent but not transferable. See, however, section 181. Besides section 11 gives only the incidents of a permanent tenure, while *heritableness* goes with its definition.—The word 'taluk' imports a permanent interest in land. "As to the meaning of the word taluk," says Markby J., "it has been said before, and we also say again, that *primâ facie* the word 'taluk' does import a permanent tenure, if there be nothing either in the surrounding circumstances, or in the instrument itself, which creates the interest to show that it was intended to be otherwise; and when we find that the chitta relating to this land describes the land as a taluk, we think, in the absence of evidence to the contrary, we ought to presume that that was a permanent interest. We must also bear in mind that that was a document drawn up under the provisions of clause 1, section 9, Regulation VII of 1822, and the revenue officer, who was responsible for that document, was bound to put a proper description of the tenure in the document, and he considered that he had sufficiently described the tenure when he called it a taluk. That document is by the express words of that section declared to be an evidence available for the purpose of proving the title of the persons claiming tenures in the lands in question"—(Kristo Chundra *v.* Meer Sufdur Ali, 22 W. R., 326). The word *taluk*, or correctly *taluq*, is derived from the Arabic word, '*alaque*' which signifies to hang from, to depend upon; *alaque* also means a leech, which hangs from the body to which

Taluk, what it means.

Derivation.

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it has attached itself, and has another quality said to have belonged also to the taluqdar, and means connexion and dependence. In Upper India, *taluk* was dependent upon, and subordinate to, the Sovereign. In Bengal, *taluk* was subordinate to the *zemindari* but not always. The larger *taluqdars* were *husuri, i.e.*, they were immediately under the Supreme Government to which they paid their revenue direct, while the smaller ones were *mukurari* or specified, *i.e.*, in the sanad of the zemindars, through whom they paid their revenue. In the North-Western Provinces the taluqdar was superior and the zemindar inferior. The reverse was the case in Bengal: The taluqdar was subordinate to the zemindar, where any relation existed between them. Some large taluqdars indeed paid their revenue direct to Government and were independent of the zemindar, but in no case was the zemindar subordinate to the taluqdars. There are in the Lower Provinces of Bengal a variety of tenures held under the zemindars and known by different names, in different districts. See notes under sections 5 and 11 of the Act. The most important of these tenures are *taluqs*. Some of these have existed from before the permanent settlement (see sections 6, 7 and 8 of Regulation VIII of 1793), and are known by the general term of *Shikimi* or dependent taluks. Patni taluks constitute another important class of subordinate tenures. See Regulation VIII of 1819 and notes. Taluqs of both these classes are inheritable and transferable by sale or otherwise. Taluqs and similar tenures created since the time of the permanent settlement and held immediately of the proprietors of estates may be protected by registration from avoidance by a sale for arrears of revenue. Taluks created since the permanent settlement are usually founded on the patni principle, and not on the principle of shikmi taluq.

Istemrari and Mokurari tenures.

They are tenures granted in perpetuity. *Mokurari* tenures are those granted at a fixed rent not liable to enhancement. "Generally speaking, however," says Mr. Field in his Introduction to the Regulations, "the two conditions are now found combined, and where the term is in perpetuity, the rent is fixed for ever. These tenures, though not called *taluqs*, differ little in their incidents therefrom. They are transferable and inheritable, and may be protected by registration from the effects of a revenue sale. Many tenures, the incidents of which were not exactly defined when they were created, have become *istemrari* and *mokurari* by custom instead of by legislation. Being allowed to descend from father to son without opposition, they have come to be regarded as istemrari more specially after one or two transfers and devolution by inheritance upon the heirs of the transferee. The law declares that, where the rent has not been changed since the permanent settlement, it cannot be enhanced, and here also a statutory presumption has been brought in to facilitate the means of proof, and thus many tenures have become *mokurari* which were not so in their inception."

Article 18 of Mr. Field's Digest runs to the following effect:—

"Of tenures, some are transferable, others are non-transferable; some are heritable, others are non-inheritable. A tenure may be made transferable or heritable

(1) by express provision of law (as *patni* tenures by Regulation VIII of 1819, section 3, clause 1); or

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(2) by contract (L. R. 4 I. A., 223; Marsh, 330; 9 W. R., 65; 19 W. R., 141); or
(3) by custom; or
(4) by the course of dealing therewith (1 W. R., 153; 10 Moo. In. Ap., 191; 11 Moo. In. Ap., 433; 12 Moo. In. Ap., 263; 14 Moo. In. Ap., 247; L. R., 4 I. A., 223; 24 W. R., 176; 7 B. L. R., 211).

"Whether any particular tenure has, or has not been made transferable or heritable by contract or custom, or the course of dealing therewith, is a question to be decided upon relevant evidence by the Court having jurisdiction. Explanation *I.*—A tenure may be transferable without being mokurari or held at a fixed rent: and a tenure may be mokurari or held at a fixed rent without being transferable (1 W. R., 5.) Explanation *II.*—A tenure may be transferable without being heritable: and a tenure may be heritable without being transferable. (Marsh, 119: Reg. XXIX of 1814, s. 2). Explanation *III.*—A tenure may be istemrari or permanent without being transferable: and a tenure may be transferable without being istemrari (Marsh, 117: 6 B. L. R., 652). Explanation *IV.*—A mokurari istemrari tenure shall be presumed to be heritable." (3 B. L. R., 226; 5 B. L. R., 652).

Permanent by Law. As putni tenures under Regulations VIII of 1819, section 3, cl. I. See also notes under sections 5 and 6 *post*.

Permanent by Contract or course of dealing. A *mokurari istemrari* holding is a perpetual (hereditary) holding at a fixed jumma —(Munrunjun *v.* Rajah Lilanund, 3 W. R., 84; 4 R. J. P. J., 461). *Ghatwalli* tenures are perpetual holdings subject to the condition of service—(Rajah Lilanund *v.* Thakoor Munrunjun, 5 W. R., 101) In this decision the meaning of the term *istemrari* was discussed. "I think," observes G. Campbell, J., "that there can be no doubt whatever that the proper and correct meaning of the word '*istemrari*' is 'perpetual..' The decision of 1853, page 654, on which the petitioners rely, says that in 'lexicography' that is the meaning; so does Wilson's Glossary put forward by petitioners. Still, however clear the meaning of the word, and however strong my own opinion that, in the ordinary transactions of the country, the term *istemrari* is understood to mean *perpetual for ever*, and not for life only, it might have required consideration if it had been shown to be the settled law of the Courts, that the term *istemrari* is held to be as artificial and customary, as distinguished from its lexicographical meaning, and so to import a life tenure only, and not a perpetual tenure. Now the whole, that is to be said on this point, seems to be contained in the *résume* in the judgment of 1853 (Musst. Amerunnesa, appellant) relied on by the petitioners. From this it appears that there had been two decisions in which *istemrari mokurari* grants had been set aside by a majority as not hereditary, and another case in which the judges unanimously held the other way, considering that the intent of the parties was to create by the disputed words a perpetual hereditary holding. It was also noted that in the Regulations of 1793 and 1815, the words were taken to import perpetuity for ever. The result was that in 1853, the judges did not think it necessary to decide that the words always meant either 'perpetual for ever' or 'for life' only but deemed it most proper to look to the true intent and meaning of the parties as shown both by their acts as well as their writings, and the case was decided on that

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evidence, I should probably be by no means disposed to dissent from such a view, and if we had decided this case on the ground that, *istemrari* meaning perpetual, no evidence to show that the parties did not use it in that sense was to be admitted, I should on the decision of 1853 have admitted a review. But we by no means held any thing of the kind. We simply remarked on the use of the word *istemrari* as among other things, tending to show the status of the ghatwals in the last century, and we translated the word '*perpetual*' which a reference to any dictionary shows to be the correct translation. Richardson gives *istemrari* (from *marra*) proceeding, going on, preserving, being rendered perpetual (rent), and *istemrari*, 'perpetual.'" This case went up in appeal to the Privy Council, and their Lordships observed: "The words *mokurari istemrari* are used, and although it may be doubtful whether they mean permanent during the life of the person to whom they were granted, or permanent as regards hereditary descent, their Lordships are of opinion that, coupling those words with the usage, the tenures were hereditary"—(13 B. L. R., 124). So it has been held that in the absence of any evidence to show that a grant was for life only, the words '*mokurari istemrari*' are sufficient to make it hereditary—(Lukhoo Koer *v.* Rai Hari Krisna, 12 W. R., 3; 3 B. L. R., A. C., 226). The use of the word "istemrari" in describing a patta shows an intention that the lease shall be perpetual and implies its hereditary character." —(Karoonakur Mahotee *v.* Niladhro Chowdhry, 14 W. R., 107; 5 B. L. R., 652). And the use of any particular form of words is not necessary to convey *mokurari mourasi* right—(Unnoda Prosad *v.* Chundra Sekhur, 7 W. R., 394; Asfur Mundle *v.* Ameen Mundle, 8 W. R., 502: Koylash Chundra *v.* Heera Lall Seal, 10 W. R., 403). "The word *mokurari*," says Mr. Justice Glover in the first of these cases, "does not occur in the patta, but it is not absolutely necessary that any particular form of words should be used in conveying rights to hold at fixed rates, and taking the nature of the lease, *i. e.*, for building purposes, the position of the parties, and the circumstances under which the contract was made, into consideration, we cannot say that the Judge has placed on the patta a construction that it cannot legally bear." Similarly their Lordships, the Privy Council Judges, observed in the case of Baboo Dhunput *v.* Gooman, 9 W, R., P. C., 3: "Their Lordships cannot accede to the argument that patta must *primâ facie* be assumed to give a hereditary interest, though it contains no words of inheritance. They do not think that the case cited from Morton's Decisions, still less that of Freeman *v.* Farlie, is any authority for such a proposition. Patta, as may be seen by referring only to Act X of 1859, is a generic term, which embraces every kind of engagement between a zemindar and his under-tenants or raiyats. Nor can it be disputed that the expressions here wanting are ordinarily used in the grant of a perpetual tenure. * * * But the facts already stated afford incontestable proof that, ever since the death of Augham Sing, the hereditary character of his sub-tenure has been recognised by the successive zemindars. There is also evidence which is not contradicted that some of them have recognised its transferable nature. This evidence affords ample grounds for inferring either that the tenure was always intended to be hereditary, although not so expressed in the patta, or that if the original grant were limited, as was suggested, to the life of Augham Sing, his tenure has, by some subse-

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quent grant, become hereditary and transferable. And upon the proof here given of long uninterrupted enjoyment, accompanied by the recognition of the hereditary and transferable character, it is almost impossible to suppose that a suit by the zemindar in the Civil Court to disturb the possession of the respondent could not be successfully resisted. The case of *Joba Sing* (4 S. D. A. Rep, 271) is an authority for the proposition that evidence of this kind will supply the want of the words 'from generation to generation' in the *patta*, which is the foundation of such a title." Where the lease contained no words importing an hereditary character and simply said *tamyad mokurari*, it was held to have the effect of being hereditary on the ground that the period of its continuance was not dependent on the life of any party, whether lessor or lessee, but on the continuance of the superior tenure.—(Babu Lekhraj *v.* Kanhya Sing, 17 W. R., 484.) "Now with regard to the lease," observed Loch, J., "we find that there is no mention therein of the period for which Choonee Lal's *mokurari* was to exist. He speaks of the possibility of the Government making a fresh settlement with him at an enhanced rent. He does not apparently contemplate such a thing as a fresh settlement being made with any other person; and having this belief in his mind, he lets the land to Nirput Sing in ticca, which ticca is to last as long as his *mokurari* lasts. I think no valid objection can be raised as to the hereditary nature of this lease merely from its being called a *ticca*, or from its comprising terms which are in use in ordinary ticcas, such, for instance, as a prohibition to cut trees, as a power to the lessor to re-enter on failure of payment of rent, as the prohibition for the resumption of rent-free lands, &c., for such terms are common to most leases, and their introduction cannot, I think, be said to indicate that the lease was merely for a term of years. The terms are used for the protection of the property and the rights of the lessor. No term is fixed in the lease,—so long as the *mokurari* lasts, so long is the *ticca* to last. No word, such as *mourasi*, is to be found in the lease. * * * But we think on a full consideration of the lease that, though it contains no word importing an hereditary character, yet it has the effect of being hereditary, for the period of its continuanee is not dependent on the life of any party whether lessor or lessee, but on the continuance of the superior tenure." Compare 19 W. R., 141 (P. C.). It has been, on the other hand, held that where there are no words in a lease extending its provisions to other parties beyond the lessee, its terms must be interpreted as applicable to the lessee only, unless the Court is able, from the conduct of the parties and the surrounding circumstances, to come to a different conclusion.—(Lekhraj *v.* Kanhya Sing, 14 W. R., 262, cited above.) Where a lease contains a condition whereby the lessor agrees not to put an end to the mokurari tenure of his lessee except on the occurrence of a fresh settlement on the part of the Goverment, it does not follow that the lessor intends to constitute a hereditary lease if no Government settlement takes place.—(*Ib.*) In such a case a lessor's right to re-enter arises on the death of the lessee, but if the representatives of the lessee have been allowed to hold over by the heirs of the lessor to whom they have paid rent, the cause of action to a purchaser of the lessor's rights and interests arise on the refusal of the lessee's representative to permit them to re-enter."—(*Ib.*) This case went up

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in appeal to the Privy Council, and their Lordships held that the rule of construction that a grant made to a man for an indefinite term enures only for the life of the grantee and passes no interest to his heirs, does not apply in cases where the term can be definitely ascertained by reference to the interest which the grantor himself has in the property, and which the grant purports to convey.—(I. L. R., 3 Cal., 210). In 1798 a mokurari patta of a portion of a zemindari was granted to *A* at a consolidated jama of Rs. 6 for the term of four years, and an uniform rent of Rs. 25 from the expiration of that period to be paid year after year. The patta provided that the mokuraridar should make improvements; that profits arising therefrom should belong to him and not to the grantor; and that he should not dispose of any portion of the land granted without the permission of the grantor. No words of inheritance were used in the grant. The grantee died in 1875, when the heirs of the grantor sued to recover possession of the estate from the heirs and assigns of *A*. The defendants contended that the grant was transferable and hereditary, that *A*, his heirs and assigns, were entitled to it in perpetuity. It was held that the grant was for the life of *A* only and not in perpetuity, and that the use of the word mokurari alone in a lease raises no presumption that the tenure was intended to be hereditary, (Govt. of Bengal *v.* Jafir Hossein Khan, 5 Moo, I. A. 467; Parameswar Protab Sing *v.* Padma Nanda Sing, I. L. R. 15 Cal. 342) and therefore in order to decide whether a mokurari lease is hereditary, the Court must consider the other terms of the instrument under which it is granted, the circumstances under which it was made, and the intention of the parties. —(Sheo Persad Sing *v.* Kali Das Sing, I. L. R., 5 Cal. 543, and in appeal, I. L. R., 8 Cal., 664.) The words istemrari-mokurari in potta-granting land do not of themselves denote that the estate granted is an estate of inheritance. Not that such an estate cannot be so granted unless, in addition to the above words, such expressions as "ba farzandan" or "naslan bab naslan" or similar terms are used. Without the latter, the other terms of the instrument, the circumstances under which it has been made, or the conduct of the parties, may show the intention with sufficient certainty to enable the Courts to pronounce the grant to be perpetual; the above words not being inconsistent therewith, though not themselves imparting it. *Held*, accordingly that where the words "mokurari istemrari" were used in connection with a grant in a potta (as it was also held in another case where the instrument was termed "mokurari ijara potta") that the question was whether the intention of the parties that the grant should be perpetual had, or had not, been shown with sufficient certainty in any other way, *e. g.*, by the other terms, by the objects, or circumstances of the grant or by the acts of the parties; and held that in the present case the intention was not shown.—(Tulshi Pershad *v.* Ram Narain, I. L. R., 12 Cal., 117; see Beni Prosad *v.* Dudh Nath, I. L. R 27 Cal. 156; 4 C. W. N. 274.) Parties holding a permanent settlement from the Government cannot question the validity of a mokurari potta previously granted by themselves when they held the property under a temporary settlement.—(Kazi Abdool Manna *v.* Baroda Kant Banerji, 15 W. R., 394.) The effect of a *solenama* confirming the rent of a tenure on the part of the manager of ancestral property, and agreeing that it shall not be enhanced, was held to create a mourasi mokurari tenure at a fixed rent.—(Bhobun

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Mohini *v.* Dhonaye Karigur, 15 W. R., 434.) Alienations made by Hindu widows of shares of an estate held as a hereditary mokurari tenure can only be contested by reversionary heirs and other persons having some interest in the estate; it is not open to the zemindar or superior landlord to object to such alienations. If the reversionary heirs make no arrangement for the due payment of the mokurari rent, the only right which the zemindar has is to sue them for arrears and then to cause the sale of the tenure, if necessary, in execution of decree, but not to take khâs possession of it by force."—(Ramdhun Shaha *v* Rajah Raj Kisto Sing Bahadoor, 18 W. R., 406.) When a party who makes a mokurari grant has enough in him to feed that grant—*i. e.*, to make it substantial and valid, he cannot in a Court of Equity be allowed afterwards to deny its efficacy.—Syed Ameer Ali *v* Heera Sing, 20 W. R., 291.) So a mokuraridar, who has got his lease from the members of a joint Hindu family who are in actual possession and managing the joint property, cannot be rejected or interfered with by another member, not in possession, unless it can be shown that he has acted dishonestly. (Poshun Ram *v.* Bhowanee Deen, 24 W. R., 318.) Where a Hindu father created a mokurari tenure within his zemindari in favour of his illegitimate daughter by a Mahomedan lady, and the lawful widows of the father sought to resume the tenure on the death of the illegitimate daughter without heirs, it was held that the mokurari tenure granted in perpetuity could not be resumed—(Mirza Himmut Bahadoor *v.* Rani Surat Koer, 15 W. R., 549.) This case went up in appeal to the Privy Council, and their Lordships said: "The grant was clearly intended to create an absolute and hereditary mokurari tenure inasmuch as it contains the essential words, 'generation to generation,' which in documents of that kind have always been considered to have that effect; and their Lordships do not find in the particular document any special terms which would distinguish it from a grant of an ordinary *mokurari istemrari* tenure. * * * It has been argued, however, that this *mokurari* not being an independent zemindari, but being carved out of a zemindari, stands upon a peculiar footing, and that, upon the failure of heirs, the zemindar takes by right of reversion, or, if not strictly by right of reversion, that the tenure escheats to him as the superior lord rather than to the Crown. The *mokurari* was clearly an absolute interest. It was also an alienable interest. It might have been seized and sold, as Mr. Doyne has shown, under Act X of 1859, even in a suit for rent. It could not have been forfeited for the non-payment of rent, for in such a case the zemindar could only have caused it to be seized, put up for sale, and sold to the highest bidder. It is, therefore, property which, like that in the case above cited, might have passed to any purchaser, whatever his nationality, or by whatever law he was to be governed. It cannot, their Lordships think, be successfully argued that, having so passed, the estate would have determined upon the death of Shurfoonnesa (supposing it had been sold in her lifetime) without heirs; for the grant contains no provision for the lessee of the estate created in such event. There seems therefore to be no ground for saying that the lands have reverted in the proper sense of the term to the zemindar; and the only question is, whether, on the failure of heirs of the last possession, he is entitled to take a tenure subordinate to and carved out of his zemindari by escheat. Their Lordships are of

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opinion that there is no authority upon which the power of taking by escheat can be attributed to the zemindar. The principles of English feudal law are clearly inapplicable to a Hindu zemindar. On the other hand it is clear that if the zemindar has no such right, the general right of the Crown subsists and must prevail" —(I. L. R., 1 Cal., 391.) Compare, however, the proviso of section 26 of this Act. A Court is not bound as a matter of law to presume that a tenure is a permanent one merely from the fact of long possession of the lands.—Nabin *v.* Madan, I. L. R. 7 Cal. 697. Long and continued possession at a low and unraised rent is not sufficient to suggest the inference that an agreement had been made between the parties that the tenant should hold a permanent tenure.—Secretary of States for India *v.* Luchmeswar Sing, I. L. R. 16 Cal., 223. On the other hand, continuous payment of rent for a hundred years has been held to give rise to a presumption that the tenant held under a mourasi title.—Braja Nath *v.* Lukhi Narayan, 7 B. L. R. 211, and possession for nearly a hundred years at presumably a fixed rent, to justify the conclusion that the tenant had a permanent and transferable interest in his tenure.—Dunne *v.* Nabo Krishna, I. L. R. 17 Cal. 144. A grant of a village for maintenance is primâ facie resumable on the death of the grantee.—Beni Prasad *v.* Dudhnath, 4 C. W. N., 274; I. L. R. 27 Cal. 156; Rameswar Buksh *v.* Arjun, L. R. 28 I. A. 1.

For other notes, see sections 5, and 10 to 14, and 182, *post*.

Permanent by Custom. See section 183 and notes *post*.

Subsection (9): Holding.—The term "holding," though apparently limited by this definition to a parcel or parcels of land held by a *raiyat*, includes also a parcel or parcels of land held by an *under-raiyat*. In section 121 crops of an *under-raiyat's* "holding" are referred to as being liable to distraint. An *under-raiyat's* "holding" is also mentioned in section 113, as amended by Bengal Act III of 1898. The term "parcel or parcels" in this definition means an entire parcel or entire parcels, and is not intended to include an undivided fractional share in a parcel or parcels of land. Undivided shares in parcels of land cannot constitute distinct "holdings" within the meaning of this Act.—(Hari Churan *v.* Raja Ranjit Sing, 1 C. W. N. 521; Harideb *v.* Janmuddin, 2 C. W. N. 688). A *raiyati* holding which, according to the definition of *raiyat* in section 5, sub-section (2), means land occupied by *raiyat* for the purpose of cultivation, can ordinarily be held only in its entirety and the cultivation of an undivided fractional share of a parcel of land would ordinarily be meaningless.—Hari Churan *v.* Raja Ranjit Sing, 1 C. W. N. 521. An agreement by a tenant with one of several joint landlords to pay his share of the rent separately does not constitute a separate tenancy under him. The term "holding" means an entire holding.—Baidyanath *v.* Sheik Jhin, 2 C. W. N. 44.

Shares in holding.

Subsection (10): Village.—The *Thakbust* or demarcation of villages preparatory to survey was conducted by a Civil Officer called Supt. of Survey, aided by a staff of Dy. Collector and Amins, who marked the boundaries of villages by mud pillars (*thàks*) which were built at certain distances. He prepared rough maps,

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on the scale of 16 inches to the mile, of boundaries of Mouzahs (villages) and estates, which are known as *thakbust* maps as aids. The Revenue Surveyors then prepared accurate scientific maps, on the scale of 4 inches to the mile, showing the boundaries of villages (mouzahs), but not estates (*mahals*), and these maps are to be found in the Offices of Collectors and the Surveyor General.—Board's Rules, Vol. I, pp. 315 and 317.

Revenue survey village maps have been prepared for all the territories under the administration of the Lt.-Governor of Bengal, with the exception of *Jungal Mahals* of Midnapore, parts of Darjeeling, parts of Sonthal Parganas, the Tributary mahals of Orissa, Hazaribagh, Ranchi, Palamau and Singbhum Districts, part of Manbhum, the Tributary Mahals of Chota Nagpur, the hilly parts of Chittagong Hill-tracts and parts of the present Jalpaiguri District.

Procedure where revenue-survey maps are out of date.

With regard to Cadastral surveys and Records-of-rights under Chapter X of this Act, the Government rules direct that—

Where there is a considerable difference between the boundary according to the revenue-survey map and the existing boundary of the village as ascertained by the Revenue Officer, the latter shall be followed for the purposes of the map and record; but the boundary of the revenue-survey map shall also be marked on the new village map.—App. VI. Chapter VI, rule 4 (c).

Procedure where no revenue-survey maps have been prepared.

The same rules empower Revenue Officers appointed under the designation of "Settlement Officers" to determine (after such local inquiry as they may consider necessary, and after issue of notice of the inquiry to all parties concerned) the area to be included in the village; and such area is to be adopted as the village unit of survey and record-of-rights.—App. V, Chapter VI, rule 4 (e).

Villages in Chittagong.

Certain maps were prepared by Lieutenant Siddons, a Revenue Surveyor in Chittagong, in 1838, but after some correspondence the Bengal Government held in 1891 that they were not revenue-survey maps within the meaning of clause (10) of section 3 of the Bengal Tenancy Act, and issued a notification under that clause, appointing Mr. C. G. H. Allen, Settlement Officer, to determine village boundaries in that district. The boundaries of all villages in the Chittagong district have been determined by Mr. Allen, in exercise of the powers so conferred upon him, with the exception of the *Ramgarh Sitakund* Forest Reserve, the permanently-settled portion of the *Maiskhal* Island, and some of the jungle-covered hills in the Cox's Bazar sub-division; so that in Chittagong a village is the area determined as such in Mr. Allen's maps and records, where he has determined village boundaries.

Subsection (11). Agricultural year:—The following table gives the agricultural year prevailing in different parts of Bengal, Behar & Orissa:

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Agricultural year.	Where prevailing.	Description of the year.	Remarks.
Bengali ...	The whole of Bengal Proper, except— the southern and western parts of the Midnapore District; Manbhum; Malda; and part of Purnea. The whole of the Sonthal Parganas except Damni-i-koh, the Godda Sub-division and Pargana Handweh of the Sadar Sub-division.	The Bengali year begins on the 1st of *Baisakh* (13th, 14th or 15th of April).	The present Bengali year (May 1905) is 1312. The Bengali year prevails in Parganas Bagri, Chandrakona, Brahmanbhum, Barda Chetua and Khariji Mandalghat of the Midnapore District.
Calendar ...	Damni-i-koh in the Sonthal Parganas.	Begins on 1st of January.	
Amli ...	Singbhum and Orissa and southern and western parts of the Midnapore District.	The *Amli* year begins on a day called the *Sunia* day, which falls between the 14th of *Bhadro* and 12th of *Aswin*.	The present *Amli* year (May 1905) is 1312.
Fusli ...	Patna Division, Palamau, part of Purnea, Godda Sub-division, Pargana Handweh of the Sadar Sub-division of the Sonthal Parganas, Monghyr and Bhagulpur.	The *Fusli* year commences on the 1st of *Aswin*.	In some parts of Monghyr the *Fusli* year commences on the 1st of *Ashar*, *i.e.*, with the sowing of the *Bhadoi* crop.

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Agricultural year.	Where prevailing.	Description of the year.	Remarks.
Maghi ...	Chittagong	The *Maghi* year begins on the 1st of *Baisakh* (13th of April) and is 45 years behind the Bengali year.	The present *Maghi* year (May, 1905) is 1267.
Milki ...	Part of the Purnea district ...	The *Milki* year begins on the 1st of *Baisakh* (13th April), but it is one year in advance of the Bengali year.	The present *Maghi* year (May, 1905) is 1313.
Sambat ...	Hazaribagh and Ranchi ...	The *Sambat* year commences with the first day of *Soodee Pukh* or second or bright semilunation of the month of *Chait*.	The present *Sambat* year (May, 1905) is 1962.
Tippera ...	Hill Tippera and the *Zemindari* of the Raja of Tippera in Tippera and Noakhali.	The Tippera year begins on the 1st of *Baisakh* (13th of April). It is 3 years ahead of the Bengali year.	The present Tippera year (May, 1905) is 1315.

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Subsection (12). Permanent Settlement:—The date of the permanent settlement is 22nd March 1793—(Baboo Dhunput Sing *v.* Baboo Guman Sing, Sp. W. R., Act X, 61; 2 R. J. P. J., 267; 4 W. R., Act X, 41). The date of the permanent settlement for the district of Jessore was the 11th April 1790—(1 W. R., 230). In the former case, Jackson, J., remarked: "We think that the date of the permanent settlement must be held to be that on which the decennial settlement being declared to be perpetual, the permanent settlement came into force. The proclamation which declared the settlement to be permanent is contained in Regulation 1 of 1793, and that Regulation distinctly lays down the date from which it is to have force and effect, *viz.*, the 22nd March 1793. In deciding this question, the Court cannot, as Mr. Doyne suggests, act upon the usual law of settlements and contracts, but must be guided by the distinct enactment of the Legislature which has declared the exact date when the permanent settlement came into force. The date of the permanent settlement mentioned in sections 3 and 4, Act X of 1859, was the date of the permanent settlement of Bengal, Behar and Orissa referred to in Regulation I of 1793, and not the date of settlement of a particular zemindari with its owner—(Musst. Poran Bibi *v.* Sedee Nazir Ali Khan, Sp. W. R., Act X, 71.) *Quære*—When did the permanent settlement take place in Cuttack?—(Sadanunda Mytee *v.* Nowrutton Mytee, 16 W. R., 289.) "The special appeal to this Court was commenced by urging that, as no permanent settlement had been carried in the district of Cuttack, the provisions of Act X of 1859 did not apply to Cuttack. The express words of s. 15, Act X of 1859, include any person possessing a permanent transferable interest in land, intermediate between the proprietor of an estate and the raiyats, who, in the provinces of Bengal, Behar, Orissa, and Benares, holds a talook or tenure 'otherwise than under a terminable lease' at a fixed rent which has not been changed from the time of the permanent settlement. The word Orissa would include the district of Cuttack under ordinary circumstances, but it is said that the words 'from the time of the permanent settlement' must confine the operation of these provisions to those districts of Orissa where a permanent settlement has taken place. An illustration was mentioned with reference to this argument from the Sunderbuns, which have not been included in the permanent settlement of Bengal; and it was urged that a raiyat who held lands from the time of the permanent settlement in the Sunderbuns would not be entitled to the presumption of s. 4, Act X of 1859. There, however, is very little doubt that, as regards the whole of the province of Bengal, the law applicable to all suits for enhancement of rent is Act X of 1859, and that any raiyat, even in the Sunderbuns, might claim the benefit of the presumption of s. 4 of the Act, or any under-tenure-holder might claim the benefit of the presumption of ss. 15 and 16 of the Act. The law, Act X of 1859, is applicable to all the provinces mentioned in the law, and it is not necessary in suits coming under it to prove that the land to which the suit relates has been the subject of a permanent settlement. It is said that it is impossible to ascertain when the permanent settlement of Cuttack took place, as in fact there has been no such settlement. We do not think it necessary in this case finally to decide this question."

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The province of Cuttack, including the port and district of Balasore, and all the territory west of the river Wardah and south of the Menulla and Gwailgur Hills, were ceded to the Company in perpetual sovereignty by the treaty of Deogum signed on the 17th December 1803, during the Government of Marquis Wellesley. Cachar, except the hilly part, was annexed in 1830. The hilly part was annexed in 1853. The Cossia (Kasia) and Jyntia Hills territory was confiscated and annexed in 1835. Darjeeling was ceded by the Raja of Sikim in 1835. Does the permanent settlement obtain in these provinces?

"We have made it clear that the permanent settlement intended is in all cases that of Bengal, Behar and Orissa made in 1793, and not as regards any district or area subsequently settled, the permanent settlement of such district or area."—(R. C. R. I.)

Subsection (14). Signed, Marked, Stamped:—This definition has been taken *verbatim* from the Civil Procedure Code (Act XIV of 1882). In the Registration Act (Act III of 1877) "*signature* and *signed* include and apply to the affixing a mark," but stamp would not be considered as a signature. In the definition under comment if a person knows to write his name, his affixing a mark will not be a signature. In the Indian Succession Act, s. 50, cl. 1, "the testator shall *sign* or shall *affix his mark* to the will, or it shall be signed by some other person in his presence and by his direction," and it has been held that the making of the mark is sufficient, although the testator can write at the time,—(Baker *v.* Dening, 8 A. and E., 94; Wms. Exors., 67); and that the mark will be sufficient if made by the testator's hand, although a wrong name be written against it, or though that hand be guided by another person (*Re*-Clark, 27 L. J., Rob. 18; Wilson *v.* Beddard, 12 S., 28; Wms. Exors., 67); and that signature may be stamped.—(Jenkins *v.* Gaisford, 3 S. W. and T., 93); and that the testator's initial, or his signature under an assumed name, may stand for and pass as his mark.—(Wms. Exors., 68.) But sealing would not be regarded as signing.—('Wms. Exors.,' 68.) Signed or signature has a very technical meaning in the Indian Succession Act.

Subsection (15).—'Prescribed' has therefore a technical meaning in this Act. See, however, s. 184 *post*, where the word has been used in its ordinary sense. We must not forget that s. 3 begins with the words "unless there is something repugnant in the subject or context." Anything *prescribed* by the High Court will not be so called within the meaning of this Act.

Subsection (16). Collector:—By a notification dated 21st April, 1886, published in the *Calcutta Gazette* of the 28th idem, Part 1, p. 466, all officers in charge of sub-divisions were invested with the powers of a Collector for the purpose of discharging the functions referred to in sections 69 to 71 (relating to produce rents) of the Act. By a notification, dated 28th May 1886, published in the *Calcutta Gazette* of 2nd June, 1886, Part 1, page 652, the Deputy Collector of Howrah, and by a notification, dated the 4th May, 1893, published in the *Calcutta Gazette* of the 5th idem, Part 1, p. 274, the Senior Deputy Collector attached to the sadar station of Gaya, were invested with powers of a Collector for the purpose of discharging the functions referred to in these sections. By a notification, dated the 7th October, 1886, published in the *Calcutta Gazette* of the 13th

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idem, Part I, p. 1092, all officers in charge of sub-divisions were invested with the powers of a Collector for the purpose of discharging the functions referred to in sections 12, 13 and 15 of the Act.

Subsection (17). Revenue Officers:—In the Board's Settlement Rules, it is pointed out that "under s. 3 (17) of the Tenancy Act, officers cannot be vested with the general powers of a Revenue officer but with certain functions only, as specified in certain provisions of the Act."—(Board's Settlement Manual, Chap. I, Rule 14, p. 5). By a notification, dated the 11th February, 1890, published in the *Calcutta Gazette* of the 12th idem, Part I, p. 121, all Deputy Collectors in the Lower Provinces of Bengal have been authorized to discharge the functions of Revenue Officers under Chap. X and have been vested with powers of a Settlement Officer under rule 1, Chap. VI of the rules framed by Government under this Act. If an officer is appointed to discharge particular duties under particular sections of this Act, he is not hereby empowered to discharge duties under other sections. Thus, his appointment to perform particular duties does not make him a "Collector" for all the purposes of the Act.—Mahabut sing *v.* Fatima, I. L. R. 28 Cal., 69.

Subsection (18). Registered:—Section 17 of the Registration Act (VIII of 1871) makes the following documents to be compulsorily registrable:

(1) Instruments of gift of immovable property.

(2) Other instruments (not being will) which purport or operate to create, declare, assign, limit or extinguish whether in present or in future, any right, title or interest, whether vested or contingent, of the value of Rs. 100 and upwards, to or in immovable property.

(3) Instruments (not being wills) which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest.

(4) Leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent.

Provided that the Local Government may, by order published in the official Gazette, exempt from the operation of this section any leases executed in any District or part of a District, the terms granted by which do not exceed ten years and the annual rents reserved by which do not exceed Rs. 50.

Nothing in clauses (2) and (3) of this section applies

(*a*) to any Composition-deed,

(*b*) to any instrument relating to shares in a Joint stock Company, notwithstanding that the assets of such Company consist in whole or in part of immovable property, or

(*c*) to any endorsement upon or transfer of any debenture issued by any such Company. Authorities to adopt a son, executed after the 1st day of January 1872 and not conferred by a will, shall also be registered.

Section 18 of Registration Act provides the following instruments to be optionally registrable:

(1) Instruments (other than instruments of gift and wills) which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future,

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any right, title, or interest, whether vested or contingent, of a value of less than Rs. 100, to or in immovable property.

(2) Instruments acknowledging the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest.

(3) Leases of immovable property for any term not exceeding one year, and leases exempted under section 17.

(4) Awards relating to immovable property.

(5) Instruments which purport or operate to create, declare, assign, limit or extinguish any right, title, or interest to or in immovable property:

(6) Wills.

(7) Acknowledgments, Agreements, Appointments, Articles of Partnership, Assignments, Awards, Bills of Exchange, Bills of sale, Contracts, Certified Copies of Decrees and orders of Courts, Covenants, Grants, Instruments of Dissolution of Partnership, Instruments of Partition, Powers of Attorney, Promissory Notes, Releases, Settlements, Writings of Divorcement, and all other documents not hereinbefore mentioned.

Section 49 of the Registration Act provides: "No document required by section 17 to be registered shall affect any immovable property comprised there in, or confer any power to adopt, or be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered in accordance with the provisions of this Act." Section 50 adds: "Every document of the kinds mentioned in clauses (1) and (2) of s. 18, shall, if duly registered, take effect as regards the property comprised therein, against every unregistered document relating to the same property, and not being a decree or order, whether such unregistered document be of the same nature as the registered document or not."

By Act III of 1885 the following sections of the Transfer of Property Act (IV of 1882) are to be read as supplemental to the Indian Registration Act, III of 1877:—

Section 54. Transfer (by sale) in the case of tangible immovable property of the value of Rs. 100 and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immovable property of the value of less than Rs. 100, such transfer may be made either by a registered instrument or by delivery of the property.

Section 59. Where the principal money secured is Rs. 100 or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses.

Where the principal money secured is less than Rs. 100, a mortgage may be effected either by an instrument signed and attested as aforesaid or (except in the case of a simple mortgage) by delivery of the property.

Nothing in this section shall be deemed to render invalid mortgages made in the towns of Calcutta, Madras, Bombay, Karachi and Rangoon by delivery to a

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creditor or his agent of documents of title to immovable property with intent to create a security thereon.

Section 107. A lease of immovable property from year to year or for any term exceeding one year, or reserving a yearly rent, can be made only by a registered instrument.

All other leases of immovable property may be made either by an instrument or by oral agreement.

Section 123. For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses.

For the purpose of making a gift of movable property, the transfer may be affected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold may be delivered.

Section 118 must also be noted, though it is not to be read as part of Act III of 1877 as the above sections are.

"When two persons mutually transfer the ownership of one thing for the ownership of another, neither thing or both things being money only, the transaction is called an 'exchange.'

"A transfer of property in completion of an exchange can be made only in manner provided for the transfer of such property by sale."

It will thus be seen that the registration of deeds of sale, exchange and mortgage of the value of Rs. 100 and upwards, leases as specified in section 107, and deeds of gift of immovable property, is rendered complusory.

Deeds of sale and exchange of under Rs. 100 in value, and deeds of gift of movable property, must be registered if they are the means of transfer, but it is conceivable that unregistered deeds of this nature might be accepted in evidence as Collateral testimony of delivery of possession.

The Bengal Tenancy Act, however, adds the following provisions for Compulsory registration.

(1) Transfers of permanent tenures, sections 12, 17.
(2) Transfers of *raiyati* holdings at fixed rates, section 18.
(3) Sub-leases by *raiyats*, sections 85 and 87.
(4) Contracts of enhancement of rent of occupancy raiyats, section 29.
(5) Contracts enhancing the rent of a non-occupancy raiyat, s. 43.
(6) Leases or agreements under section 48 (*a*).

In addition to these, incumbrances may be registered and notified to the landlord under section 176.

The word "registered" is also used in this Act with reference to the Land Registration Act, and also for the registration of improvements before Revenue-officers under s. 80.

The registration of a document can only be said to be compulsory when it is brought under section 17 of the Indian Registration Act by a specific Act of the Legislature.

Lease.—The Act makes an important omission by not defining the word "lease;" the word occurs in several sections of the Act, but it is not defined *e.g.*, ss. 20 (1) 44

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(c), 45, 47, 48, 49 178, 179. "Lease" in s. 3 of Act III of 1877 (The Registration Act) "includes a counterpart, kabuliyat, an undertaking to cultivate or occupy, and an agreement to lease." So in s. 3, cl. 12 of Act I of 1879 (The Indian Stamps Act) it means "a lease of immovable property and includes also (*a*) a potta; (*b*) a kabuliyat or other undertaking in writing, not being a counterpart of lease to cultivate, occupy, or pass or deliver rent for immovable property; (*c*) any instrument by which titles of any description are let; and (*d*) any writing on an application for a lease intended to signify that the application is granted." In s. 105 of Act IV of 1882 (The Transfer of property Act) "a lease of immovable property is a transfer of a right to enjoy such property, made for a certain time express, or implied, or in perpetuity in consideration of a price paid or promised, or of money a share of crops, service or any other thing of value, to be rendered periodically, or on specified occasions, to the transferrer by transferee, who accepts the transfer on such terms. The transferrer is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, shares, service or other thing to be so rendered is called the rent." Mr. Field in his Digest defines a lease to mean "a contract creating or continuing the relation of landlord and tenant and executed by the landlord in favour of the tenant."

Registration of leases:—Section 17, [cl. (*d*), of Act III of 1877] makes compulsory the registration of leases of immovable property from year to year, or for any term exceeding one year, or reserving yearly rent, provided that the Local Government may, by order, exempt from the operation of this clause leases executed in a district or part of a district the terms granted by which do not exceed five years and the annual rents reserved by which do not exceed five years and the annual rents reserved by which do not exceed fifty rupees. Section 18, cl (c), of the Act makes optional the registration of leases of immovable property for any term not exceeding one year and leases exempted under section 17. Under these sections it has been held that the registration of deeds which are mere preliminaries to the main contract or engagement or which are steps in or mere parts of a transaction, is not compulsory. Accordingly it has been held that an *amuldustuk* is only a preliminary to a lease and not a lease and its registration is not compulsory.—(Bunwaree Lal *v.* Sungur Lal, 7 W. R., 280.) Nor a *doul* or *amuldari* is so. (Goluk Kishore *v.* Anund Mohan, 12 W. R., 394.) Nor a *doul darkhast*.—(Meherunnesa *v.* Agunee, 17 W. R., 509; Chuni Mandur *v.* Chundi Lal, 14 W. R., 178; Winterscale *v.* Gopal Chunder, 8 B. L. R., O. S., 90, Bhaio Abnath *v.* Kishore Mohiny, 3 B. L. R., App.; Maharaja Luchmesour *v.* Rung Lal, I. L. R., 7 Cal., 708.) A *doul darkhast*, even if attested by witnesses is not a lease.—(Lal Jha *v.* Negroo, I. L. R., 7 Cal., 717.) But if it has the word "granted" upon it signed by the landlord, and the word purports to accept the contract, it is a complete lease and requires registration.—(Syud Sufdar Reza *v.* Amzed Ali, I. L. R., 7 Cal., 703.) A *doul fehrist* is only a record of the zemindar's agent of rents settled with the raiyats, and to which various raiyats affix their signatures in testimony of the correctness of the rents recited thereon.—(Gunga Prosad *v.* Gugun Sing, I. L. R., 3 Cal., 322; Kartik *v.* Khakan, 1 C. L. R., 328; Naran *v.* Ram I. L. R., 5 Cal., 864.

What are leases and what are not.

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An entry showing the extent of the holding, the amount of rent payable, disbursement and balance, made in book of the lessor and signed by the lessee, at a date subsequent to the lessee's entering upon possession under a verbal agreement is not a lease.—(Rani Narain Kumari *v.* Ram Krishna, I. L. R., 5 Cal., 864.) A document providing for the payment of *salami* for a lease is not a lease.—(Kedarnath *v.* Surendra Dev, I. L. R., 9 Cal., 865.) So a correspondence does not amount to a lease.—(The Port Canning Land Investment Reclamation and Dock Co., Ld. *v.* A. Smith, 21 W. R., 315.) Where by an *ekrarnama* tenants conjointly promised that they would sign, and have registered, kabuliyats for rents at rates mentioned, it was held that the document did not come under cl. (b) of sec. 17 of the Registration Act, III of 1877, but came under cl. (h) as a document merely creating a right to obtain another document, which would, when executed, create or declare an interest (*Pratap Chandra* v. *Mohendra Nath* I. L. R., 17 Cal., 291; L. R., 16 I. A., 233). A document providing for the payment of a portion of a *salami* on the day when possession was to be given and for the payment of the remainder by instalments is not a lease or an agreement to lease, and is admissible in evidence without registration (*Kedar Nath* v. *Surendro*, I. L. R., 9 Cal., 865). An agreement varying the terms of a lease need not be reduced to writing or registered (*Satyesh* v. *Dhampal*, I. L. R., 24 Cal., 20). Leases creating mere tenancies-at-will do not require registration (*Khuda Baksh* v. *Sheodin*, I. L R., 8 All., 405; *Jivraj Gopal* v. *Atmaram Dayaram*, I. L. .R, 14 Bom., 319), A document given by the owner of land to his tenant varying the terms of tenancy with reference to the amount of rent to be paid is not an instrument relating to an interest in immovable property and does not require registration (*Obai Goundan* v. *Ramalinga Ayyar*, L. L. R., 22 Mad., 217). A lease for one year certain containing an expression on the tenant's part to hold the land longer at the same rent, if the landlord should desire it, is a lease for a term not exceeding one year and does not require to be registered (*Apu Budgavda* v. *Narhari Annaji*, I. L. R., 3 Bom, 21. See also *Jagjivan Das Javherdas* v. *Narayan*, I. L. R., 8 Bom., 493; *Jagdesh Chandra Biswas* v. *Abidullah Mandal*, 14 W. R., 68; *Sautho Prasad Das* v. *Parasu Pradhan*, 26 W. R., 98; *Khayali* v. *Hasain Bakhsh*, I. L. R., 8 All., 198; and *Boyd* v. *Krieg*, I L. R., 17 Cal., 548). Where a lease contained provisions for an "annual rent" and for payment "of rent in advance each year," but also contained a clause whereby the tenancy was absolutely determinable at any moment at the option of the lessor, it was held that such a deed was not compulsorily registrable (*Ratnasabhapathi* v. *Venkatachalam*, I. L. R., 14 Mad., 271). A lease for more than a year is not the less a lease because a condition is attached to the consideration, and because its term may be lessened on the payment of a sum of money by the lessor. Such a lease cannot be used in evidence unless it is registered.—(*Buksh Ali* v. *Sreemati Navatara*, 13 W. R., 468.) A lease for so long as the lessee or tenant continues to pay the stipulated rent is a lease not limited to a year and must be registered.—(*Seogolam* v. *Budreenath*, 4 N. W. P. Rep., 36.) Where a kabuliyat for one year contains a provision extending its term to more than that period it cannot be admitted in evidence without registration.—(*Kisto Kali* v. *Agemon Bewa*, 15 W. R.,

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170.) So when a potta for one year contains a provision that it is to remain in force till another potta is granted, it must be registered—(Venkata Chelhun *v.* Audian, I. L. R., 3 Mad, 358.) But a kabuliyat in which a raiyat agrees to hold land under a potta for a specified year, the agreement between the parties being that at the close of that period a fresh settlement would be made, was held to be a lease for a year, and not to need registration, although a clause intervened to the effect that year by year the raiyat would pay rent at the above rate. (Jugdesh Chunder *v.* Ahedullah Mundle, 14 W. R., 68.) A lease for six months certain contained a condition that after the expiry of the term aforesaid, the lessee might continue in possession till the lessor called upon to vacate. This was held not to have extended the term for which the lease was granted, as at the conclusion of that term the lessee would be only a monthly tenant of the lessor.—(Morôvithal *v.* Tukaram, 5 Bom. A. J., 92.) So a kabuliyat for one year certain, containing an expression on the tenant's part of his readiness to hold the land longer, if the landlord should desire it, was held to be a lease for one year only.—(Apu Budgarda *v.* Narhari Annaji, I. L. R., 3 Bom., 21.) Leases which were exempted from the operation of s. 17, cl. 4, Act XX of 1866, were leases the term of which was one year certain. Where a *sur-i-peshgi* lease was granted for one year, but with a stipulation that unless the loan were repaid within that time it should continue in full, it was held that such a lease came within the words of s. 17, cl. 4, Act XX of 1866, "leases of immovable property for any term exceeding one year," of which registration is compulsory (Bhabani Mahti *v.* Shibnath, I. L. R, 13 Cal, 113.) Section 49 provides that "no document required by s. 17 to be registered shall affect any immovable property comprised therein, or confer any power to adopt, or be received as evidence of any transaction affecting such property or conferring such power unless it has been registered in accordance with the provisions of the Act." Section 48 of Act III of 1877 provides that "all non-testamentary documents duly registered under this Act, and relating to any property whether movable or immovable, shall take effect against any oral agreement or declaration relating to such property, unless where the agreement or declaration has been accompanied or followed by delivery of possession." Where a potta has been found inadmissible by reason of non-registration, no contract which it contains can be received in evidence.—(Denonath *v.* Debnath, 13 W.R., 307; Musst. Kaboolun *v.* Shumsher Ali, I.L.R., 5 Cal., 864). A document which is not really a lease but a usufructuary mortgage, the consideration of which is less than Rs. 100, is not inadmissible for want of registration (Ishan Chandra *v.* Sujan Bibi, 7 B. L. R., 14; Ram Dulari Koer *v.* Thakur Rai, I.L.R., 4 Cal. 61). An agreement for a lease for four years needs registration, if the parties intend to create a present demise, though the agreement may contemplate the subsequent execution of a formal document (Parmananddas Jivandas *v.* Dharsey Virji, I. L. R., 10 Bom., 101). A lease of immovable property for the life of the lessee is a lease for a term exceeding one year and therefore requires registration (Parshotam Vishnu *v.* Nana Prayag, I. L. R., 18 Bom., 109).

The following remarks occur in the statements of objects and reasons of the registration Act of 1871. "Certain decisions of the High Court at Fort William have made serious inroads on s. 49 of the same Act, which declares that no instrument requiring to be registered but

Secondary evidence regarding unregistered leases.

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not registered shall be received in evidence in any civil proceeding in any Court. The High Court has decided that an unregistered document requiring registration as affecting an interest in land is admissible in evidence in a civil proceeding for any purpose for which registration is unnecessary. The section has been redrawn so as to preclude, it is hoped, in future, a contention so opposed to the intention of the Legislature."—(The Gazette of India, Oct. 5, 1870). Accordingly Section 49 of the Registration Act enacts that no document required by section 17 to be registered shall affect any immovable property comprised therein, or be received as evidence of any transaction affecting such property unless it has been duly registered, and under sec. 91 of the Evidence Act secondary evidence of the contents of such a document is inadmissible (*Man Mohini Dasi* v. *Bishen Mayi Dasi*, 7 W. R., 112; *Omar* v. *Abdool Ghafur*, 9 W. R., 425; *Rahmatullah* v. *Sariatullah*, 10 W. R., F. B., 51; 1 B. L. R., F. B., 58; *Ram Kumar Mandal* v. *Brajahari Mirdha*, 10 W. R., 410; 2 B. L. R., A. C., 75; *Kabulan* v. *Shamsher Ali*, 11 W. R., 16; *Kala Chand Mandal* v. *Gopal Chandra Bhattacharji*, 12 W. R., 163; *Dinonath Mukherji* v. *Debnath Mullik*, 5 B. L. R., App., 1; 13 W. R., 307; *Futeh Chand Sadhu* v. *Lilambhar Singh Das*, 9 B. L. R., 433; 14 Moo. I. A., 129; 16 W. R., P. C., 26; *Crowdie* v. *Kular Chaudhri*, 21 W. R., 307; *Shiba Sundari Debya* v. *Saudamini Debya*, 25 W. R., 78; *Ram Chandra Haldar* v. *Gobinda Chandra Sen*, 1 C. L. R., 542; *Hurjivan Virji* v. *Jamsetji Nowroji* I. L. R., 9 Bom., 63; *Nangali* v. *Raman*, I. L. R., 7 Mad., 226; *Sambayya* v. *Gangayya*, I. L. R., 13 Mad., 308; *Parashram* v. *Ganpat* I. L. R., 21 Bom., 530; *Martin* v. *Sheoram*, I. L. R., 49 All., 232.) But if a lease cannot be proved on account of non-registration, the landlord is not debarred from giving other evidence of a tenancy.—*Venkatagiri* v. *Raghava*, I. L. R., 9 Mad., 142; *Dinanath* v. *Debnath*, 14 W. R., 429; *Reza Ali* v. *Bhikan*, 7 W. R., 334. Similarly a tenant can prove his tenancy without proving his lease which is inadmissible for want of registration.—*Surath* v. *Catharina Sophia*, 1 C. W. N., 248; *Sitanath* v. *Kartik*, 4 C. W. N., lxii; *Kedarnath* v. *Shanfannisa*, 24 W. R., 425. An unregistered document requiring registration as affecting an interest in land is admissible in evidence for any purpose for which registration is collateral (*Lachmipat Sing Dugar* v. *Khairat Ali*, 4 B. L. R., F. B., 18; 12 W. R., F. B., 11; *Shib Prasad Das* v. *Annapurna*, 12 W. R., 435; 3 B. L. R., A. C., 451; *Alfatunnissa* v. *Hussain Khan*, I. L. R., 9 Cal., 520; 12 C. L. R., 209; *Khushalo* v. *Bihari Lal*, I. L. R., 3 All., 523; *Subramaniam* v. *Perumal* I. L. R., 18 Mad. 454; *Autaji*, v. *Daltaji*, I. L. R., 19 Bom. 36; *Vani* v. *Bani*, I. L. R., 20 Bom. 553; but this is only when the transaction is divisible.— *Krishna Lal* v. *Bonomali*, I. L. R., 5 Cal; 5 C. L. R., 43; see also 11 C. L. R., 166; I. L. R. 10 Cal., 315. An unregistered document, if followed up by delivery of possession, may be used as evidence of that possession (*Gopi Chand* v. *Liakat Hossein*, 25 W. R., 211). In a suit for a breach of a covenant to register contained in an unregistered mortgage deed, the defendant cannot plead the non-registration of the instrument for the purpose of protecting himself. Such a deed is admissible in evidence for a collateral purpose without being registered (*Sham Narain Lal* v. *Khimajit Matoe*, 4 B. L. R., F. B.,

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1 ; 12 W. R., F. B., 11 ; *Manmothonath De* v. *Srinath Ghosh,* 20 W. R., 107 ; *Nagappa* v. *Devu,* I. L. R., 14 Mad., 55; *Raja of Venkatagiri* v. *Narayana Reddi,* I. L. R., 17 Mad., 456 ; *Magniram* v. *Gurmukh Rai,* I. L. R., 26 Cal., 334).

Priority of registered documents.

The question of priority of registered documents has led to numerous contradictory decisions. It seems now to be a settled law that when the case falls under s. 481 of the Registration Act, the registered document will prevail against an oral agreement with regard to the same property, "*unless where the agreement or declaration has been accompanied or followed by delivery of possession.*" This proviso was in early decisions held also to apply to cases falling under s. 50. The ruling decision to that effect was that of Salim Shaikh *v.* Boidonath (12 W. R., 217), in which Markby, J., reviewed a number of early decisions, and was followed in Nursing Porkaet *v.* Musst. Bewa (14 W. R., 250 ; 5 B. L. R., 2 R. App. 86), where Jackson, J., held that if possession of immovable property has been given under an unregistered lease, a subsequent grantee of a registered lease cannot maintain a suit to evict the lessee in possession on the ground of the priority of his deed—(Gour Kanta *v.* Sridhur, 12 W. R., 456 ; Narain Doss *v.* Gungaram, 20 W. R., 287.) The same view was adopted in Denonath *v.* Auluk Moni, I. L. R., 7 Cal., 753, in which Field, J., reviewed a number of early decisions, and Prinsep, J., referred to the unreported case of Indra Narain *v.* Phool Mani, decided by himself and Markby, J. The reason which led the Judges in these cases to apply the proviso of s. 48 to s. 50 is thus forcibly expressed by Prinsep, J.:—"I am unable to learn any valid reason for any difference between an unregistered and an oral agreement, both followed by delivery of possession, or why, where registration is optional, such a deed should be placed at a disadvantage, in other words why, because such an agreement has been reduced to writing, it should not at least be as good as the previous state of the same transaction before the terms agreed on were fixed and made certain by a permanent record. 'Such a construction of the law' to quote a recent judgment of the Privy Council in the same Act, 'would cause great difficulty and injustice' which it cannot be supposed the Legislature contemplated, and would be inconsistent with the language and tenor of the rest of the Act.—(Mahomed Ewaz *v.* Brij Lal, L. R., 4 S. A. A., 166). If the terms were interpreted strictly, a person in the position of the respondent Fulmani would have a title not only uncertain but dependent on the conduct of her vendor, until she had perfected that title by a possession of twelve years, so as to enable her successfully to plead limitation. I find it impossible to conceive the Legislature intended to countenance such a state of things, and therefore it appears to me that the rule laid down in the case of Salim Sheik must be followed, and we must hold that notwithstanding the enactment of s. 48 of the Act of 1871, the full force of that rule is unaffected." (See also Balaram Nimchand *v.* Appa, 9 Bom., 121, where Westropp, C. J., gives a summary of the decisions and his own opinion. In Fazluddin Khan *v.* Fakir Mahomed (I. L. R., 5 Cal., 356) however the Court (Garth, C. J., and Pontifex, J.) gave a new turn to the decisions on this point. They held that the leading case of Salim Sheik and most of the subsequent decisions dependent upon it were under s. 48, and "that the only reasonable construction of s. 50 of

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Act VIII of 1871 is that where property under the value of Rs. 100 is purchased by two innocent purchasers, the one by a registered deed and the other by an unregistered deed, and there is no fraud shown, or other circumstances which in equity would protect the unregistered purchaser against the registered, the title of the latter shall prevail. The section contains no such qualification as that a purchaser under an unregistered deed who has obtained possession, would have priority against a subsequent purchaser under a registered deed, and the Courts are not at liberty to import such a qualification into the section."—(*Per* Garth, C. J.). Referring to the observations of Mr. Justice Prinsep, quoted above, Mr. Justice Pontifex said: "I am unable to follow this reasoning to its full extent, for it seems to me to be founded on the assumption that the words *relating to possession*, which are found in s. 45 of the Act of 1871 and the present Act, were inserted for the protection of oral alienees, whereas, in my opinion, they were inserted for the purpose of limiting the operation of oral alienations, and of declaring the law with respect to them. Section 48 of Act XX of 1866 had provided that all instruments duly registered should take effect against any oral agreement or declaration. Yet that Act did not declare oral alienations to be invalid to all intents and purposes, nor was it the object of the Registration Acts to repeal the existing law which authorized oral alienations of both movable and immovable property of any value, and whether voluntary or for valuable consideration. It therefore became necessary to qualify the too general language of s. 48, Act XX of 1886, and at the same time to declare the law as to oral alienations, which were not intended to be affected, which object was accomplished by patching on a proviso to the section. Section 48 of the Act of 1871 is applicable to *all* oral transactions, whether voluntary or for valuable consideration, and whether the property is movable or immovable, and whether its value is over or under Rs. 100. The insertion of the words *relating to possession* in s. 48 appears to me, therefore, to have been merely intended as a declaration of the law limiting the operation of oral alienations. It was, in fact, equivalent to saying that although the Registration Acts are not intended to interfere with oral alienations which, from the nature of the case, cannot be registered, yet the only oral alienations of which the law can take notice, in competition with registered instruments, are those which are properly established by evidence of possession. The insertion in s. 48 of the words relating to possession, in fact rather detracts from, than adds to, the security of oral alienations because unless the oral alienee was in possession the Courts now would be excluded from considering any equity which he might have against a subsequent alienee by registered deed." The turning point, however, is the equity of notice that was discussed in this case. "If it could be shown," says the learned Chief Justice, "that the subsequent purchaser under the registered instrument had notice of the conveyance by the prior unregistered deed, then the equitable doctrine which obtains in like cases in England and which is explained in the case of Le Nevi v. Le Nevi (3 Atk., 646, and 2 White and Tudor's L. C., 34) might prevent the registered purchaser from asserting his rights against the unregistered under s. 50." Mr. Justice Pontifex observed: "In Benham v. Keane (1 J. and H., 702), V. C. Wood very clearly stated the principles of equity which apply. He says: 'The whole doctrine

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of notice proceeds on this—where a man has created a charge affecting his estate, he is not at liberty to enter into any new contract in dissolution of the interest which he has created. The Court will not allow him to do the wrong himself, nor will it suffer any third person to help him to do it. No one will be permitted to enter accordingly into a contract with a person so situated, which would redound to his benefit at the expense of the prior incumbrance. The conscience of a purchaser is affected through the conscience of the person through whom he buys; that person is precluded by his previous acts from honestly entering into a contract to sell, and therefore any one who purchases *with the knowledge that his vendor is precluded from selling*, is subject to the same prohibition as the vendor himself. I think therefore that we ought to interpret s. 50 as intended to apply to the case of two innocent purchasers, giving the preference to the one who has taken the greater precaution to secure his title, but not as intended to apply to the case of a subsequent purchaser who registers, but who at the date of his purchase, had actual notice of a prior unregistered purchase. For otherwise, in this latter case, the subsequent purchaser with *full notice* would, by registration, be enabled wilfully to defraud a prior purchase of the property, which he had honestly purchased, and which had been properly and *legally* conveyed to him. But, according to the English decisions, the notice of fraud must be very clearly proved." These contradictory decisions led to a Full Bench, which held (Prinsep, J., dissenting) that the fact of a vendor having given possession to the first and unregistered purchaser, even if such possession continued to the date of the second conveyance, did not necessarily prevent the operation of that part of s. 50 of the Registration Act which enacts that "a registered document shall take effect as regards the property therein comprised against every unregistered document relating to the same property," and the only case in which the title of the prior unregistered purchaser can prevail against the subsequent registered purchaser for value is when the latter takes with notice of the title of the former.—(Narain Chunder *v.* Dataram).

Omissions:—As already observed the word "lease" has not been defined by this Act. So the words 'land' (see *ante*, p. 30, and s. 20), 'private land' (see Chapter XI), 'waste land' (see s. 178,) 'joint-landlords' (see s. 188), 'pasturage,' 'forest rights' (see s. 193), 'utbundi' (see s. 180), 'service tenure' (see s. 187), 'homestead' (see s. 182), 'mokurari lease' (see s. 179), 'abwabs' (see s. 74), 'transfer' (ss. 11, 26, 72 and 73), have not been defined, and their meaning is to be gathered from the context or other Acts. (See the sections referred to).

Definitions in the body of the Act—The word "tenant" has been defined in s. 4, "tenure-holder" and "raiyat" in s. 5, "settled raiyat" in s. 20, and "occupancy right" in ss. 21 and 22, "admitted to occupation" in s. 47, "improvement" in s. 76, "protected interest" in s. 160, "incumbrance" and "registered and notified incumbrance" in s. 116.

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CHAPTER II.

CLASSES OF TENANTS.

Classes of tenants.

4. There shall be, for the purposes of this Act, the following classes of tenants, namely :—

(1) tenure-holders, including under-tenure-holders,

(2) raiyats, and

(3) under-raiyats, that is to say, tenants holding whether immediately or mediately under raiyats ;

and the following classes of raiyats, namely :—

(*a*) raiyats holding at fixed rates, which expression means raiyats holding either at a rent fixed in perpetuity or at a rate of rent fixed in perpetuity,

(*b*) occupancy-raiyats, that is to say, raiyats having a right of occupancy in the land held by them, and

(*c*) non-occupancy-raiyats, that is to say, raiyats not having such a right of occupancy.

Extended to Orissa (Not., Sep. 10th, 1891).

This section contemplates a logical division of all classes of tenants under the Act. The classification will appear more clear from the following table :—

Tenants ... { (1.) Tenure-holders and under-tenure-holders.
(2.) Raiyats { (*a*) Raiyats at fixed rates. (*b*) Occupancy raiyats. (*c*) Non-occupancy raiyats,
(3) Under-raiyats.

"Tenant" is a general term for tenure-holders, raiyats, as well as under-raiyats, while the word "raiyat" includes three classes of raiyats described as (*a*), (*b*) and (*c*). It follows that an under-raiyat is a tenant but not a raiyat, while a non-occupancy raiyat is both a raiyat and a tenant. The word "tenant" has been defined in clause (3) of section 3, and "tenure-holder" and "raiyat" in section 5. In Act X of 1859 and Act VIII of 1869 B. C., the tenants were not classified so distinctly, but from the context it could be gathered that those Acts also contemplated three classes of raiyats, *viz.*, raiyats at fixed rates (section 3, Act VIII of 1869 B. C. and Act X of 1859), occupancy raiyats (section 6, Act VIII of 1869 B. C. and Act X of 1859), and non-occupancy raiyats (section 8). Under-raiyats were not mentioned; except cursorily in section 6, and tenure-holders not provided, except in section 26 of Act VIII of 1869 B. C., and section 27 of Act X of 1859. In Act XVIII of 1873, which is the existing "North Western Provinces Rent Act," five classes of tenants are contemplated *vis.*, middlemen (section 4), tenants at fixed rates (section 5), ex-proprietory tenants (section 7),

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occupancy tenants (section 8), and tenants-at-will (section 21). Of these ex-proprietory tenants are only a special class of occupancy tenants.

The classification made in this section is, however, not exhaustive. There may be a separate class of raiyats within the general body of occupancy raiyats—(*vide* clause *c* of section 31; compare also 6 Weekly Reporter, Act X, 33, Ram Coomar *v.* Bhyrub Chandra; and 9 W. R., 83, Sadhoo Singh *v.* Ramanoogra, Lal; 9 W. R. 349, Parmananda *v.* Puddo Mani; 12 W. R., 162, Gauri Nath *v.* Ramgati).

Meaning of "tenure-holder" and "raiyat."

5. (1) "Tenure-holder" means primarily a person who has acquired from a proprietor or from another tenure-holder a right to hold land for the purpose of collecting rents or bringing it under cultivation by establishing tenants on it, and includes also the successors in interest of persons who have acquired such a right.

(2) "Raiyat" means primarily a person who has acquired a right to hold land for the purpose of cultivating it by himself, or by members of his family, or by hired servants, or with the aid of partners, and includes also the successors in interest of persons who have acquired such a right.

Explanation.—Where a tenant of land has the right to bring it under cultivation, he shall be deemed to have acquired a right to hold it for the purpose of cultivation notwithstanding that he uses it for the purpose of gathering the produce of it or of grazing cattle on it.

(3) A person shall not be deemed to be a raiyat unless he holds land either immediately under a proprietor or immediately under a tenure-holder.

(4) In determining whether a tenant is a tenure-holder or a raiyat, the Court shall have regard to—

(*a*) local custom, and

(*b*) the purpose for which the right of tenancy was originally acquired.

(5) Where the area held by a tenant exceeds one-hundred standard bighas, the tenant will be presumed to be a tenure-holder until the contrary is shown.

Distinctions between tenure-holder and raiyat.—Subsection (1) read with cl. (*b*) of subsection (4) means that we are to see the original purpose of the acquirement or creation of the tenancy. If a person acquire a land for the purpose of bringing it under cultivation *by establishing* tenants *on it*, he is a tenure-holder.

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But if a person acquires it for the purpose of cultivating it by himself, and then abandons his purpose, and establishes tenants upon it, he is a cultivator. This seems to be consistent with s. 85, under which a raiyat can, under certain circumstances, sub-let. But again under s. 20, in order to be a settled raiyat with a right of occupancy, the cultivator must continue to hold his land as a raiyat, *i. e.*, for the purpose of cultivating it by himself, or by hired servants or by partners. This, however, is in consonance with the case law on the point. In the case of Karoolal Thakur *v.* Luchmeeput Dogar (7 W. R., 15), the learned Judges observed: "On the first point the judgment of the Principal Sadar Amin is clear, and in our opinion substantially sound. It is as follows: 'I hold without any doubt that the tenure of the vendor was that of a cultivator or raiyat, and therefore as such did not require registration when plaintiff purchased it, the provisions of s. 27 of Act X being expressly applicable only to persons holding a permanent transferable interest between the zemindar and the cultivator. The nature of the disputed tenure as raiyati, is proved by the potta of the defendant's vendor's ancestors granted by the zemindars in 1205. * * * It appears from its contents to have been granted to tenants who had been old cultivators in definition of a *durbundee* rate on all lands held by them in the pergunnah; it describes them and assigns to them the potta as *abadkars, malgusoors* and *mokurari jotedars*, all of which words characterise the tenancy as that of *cultivators*; it continues to them the cultivation as such, and then winds up by adding that *you will sow or cause to be sown the lands so held by you, and pay rents*, &c., which again is definite in that the tenure was raiyati and was continued as such. It is argued that the words *cause to be sown* are indicative of the tenure having been made *intermediate* when the above potta was given whatever it may have been before it, as the tenants were permitted to have cultivators under them. But this is an incorrect interpretation of the words quoted, which are quite consistent with the wording of a raiyati potta. The tenants were by the potta continued as raiyats, and a right created as such by the zemindar need not be a khudkasht or self-cultivating tenant to maintain his rights as such. If he sub-let his tenancy, the nature of it will not be altered thereby: as in respect of the zemindar, he will still continue its tenant, and will be responsible to the zemindar for the rent as such.' We agree with the principal Sadar Amin in thinking, for the reasons given by him in his judgment, that this tenure is merely a raiyati tenure and therefore not one the transfer of which required registration in the sherista of the zemindar. Everything points to this conclusion, except the fact of the so-called *putnee* which the original tenants granted. No doubt their treating this lease as a *putnee* goes to show that they themselves deemed their position to be something more than that of mere raiyats. Still we do not think that the course thus adopted can alter the nature of the tenure if it in its inception was, as we have no doubt it was, merely raiyti. It is frequently difficult to say what tenures are raiyati and what are those of middlemen. In the case of Ram Mungal Ghose *v.* Lukhee Narain Shaha (1 W. R., 70), a Division Court held that the mere fact that one who holds land sub-lets it, does not make him a middleman, and that the real question to be tried was 'whether the defendant was or was not a raiyat, or one who *held land* under

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cultivation by himself or others who took for him under his supervision as a superior cultivator, or whether he was a middleman because he really did not cultivate in the sense of s. 6 (Act X), but was a general lease-holder or a speculator in land rent.' Applying this rule, it appears to us that those under whom the plaintiffs claim were not middlemen, but that they held the lands in question under cultivation by themselves, or by others taking under them. In our opinion, therefore, it is unnecessary to register in the zemindar, sherista transfers of this tenure." So in Durga Prosonno Ghose *v.* Kalidas Dutt, 9 C. L. R., 449, Mr. Justice Field observed: "There is almost no evidence on the part of the defendants to show what was the nature of their interest in its inception. The only real evidence which there is, is on the part of the plaintiff, and goes to show that at the time when the interest of the defendants was created, there were already raiyats upon the land, and that the interest created in the defendants was a right not to the actual physical possession of the land itself, but to collect the rents from the raiyats who were already in possession. We have already expressed our opinion in another case that the only test of raiyati interest which can be applied in the present state of the law is to see in what condition the land was when the tenancy was created. If raiyats were already in possession of the land, and the interest created was a right not to the actual physical possession of the land, but to collect the rents from those raiyats, that we think is not a raiyati interest. If, on the other hand, the land was jungle or uncultivated or unoccupied, and the tenant was let into the physical possession of the land, that would be a raiyati interest; and the nature of this interest so created would not, according to a number of decisions of this Court, be altered by the subsequent fact of the tenant sub-letting to under-tenants. Applying this test to the present case, we are unable to agree with the Subordinate Judge that the interest here created was in its inception a raiyati interest." Similarly in Baboo Dhunput Sing, *v.* Baboo Goman Sing Sp. W. R. (Act X, 61), the Court (W. S. Seton-Karr and E. Jackson, JJ.) observed: "It is very difficult to lay down any general definition of the word 'raiyats.' As a general rule, they are the cultivating tenants, but they may not be cultivators at all themselves; they may cultivate their land by hired labour or by under-tenants. In this case the amount of land included in the tenure is, we think, sufficient evidence that the tenants are not raiyats, and that view is supported by the light thrown on the fact by the original potta, which addresses the original lessee as *mustagir*, and directs him to take measures to have the land cultivated by hillmen as raiyats, the land lying on the borders of the hill ranges in the north of the Purneah district." As we have already observed, the definition seems to say that if a land is acquired originally for the purpose of sub-letting the person acquiring would be a tenure-holder; but if it is acquired originally for the purpose of cultivation and subsequently sub-let, he would be a raiyat. In Gopee Mohan Roy *v.* Shib Chandra Sein (1 W. R., 68), the Court observed: "It is difficult to draw a distinction between a raiyat with a right of occupancy and a middleman; for occupancy does not necessarily imply cultivation, and middlemen do not come within this section (s. 6 of Act X of 1859)." In Rama Mungul Ghose *v.* Lukhee Narain Shaha (1 W. R., 71), it held that the mere fact of a raiyat

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sub-letting would not of itself make him a middleman. "The real question which the Judge should have tried is, whether the defendant was or was not a raiyat, or one who held land under cultivation by himself or others who took for him under his supervision as a superior cultivator, or whether he was a middleman, because he really did not cultivate in the sense of s. 6, but was a general lease-holder or speculator in land rent. In the former case, however, we would not call the transaction as a sub-lease. "A person who takes an ijara or farming lease of a whole village is a middleman and not a raiyat"—Hurish Chunder *v.* Alexander, Marsh, 479.) The mere fact that a person has acquired from a proprietor or from another tenure-holder a right to hold land for the purpose of collecting rent is not sufficient to prove that he is a tenure-holder within the meaning of the Bengal Tenancy Act. It must be proved that the land was let for agricultural or horticultural purposes (Umrao *v.* Mahomed Rojabi, I. L. R., 27 Cal., 205: 4 C. W. N., 76). In this case the land was situated within the Municipality of Dacca, and there was nothing to show that it was let out for agricultural or horticultural purposes. But if agricultural or horticultural land be let out for the purpose of collecting rents the lessee would be a "tenure-holder," although he may not cultivate any of the land himself. Where a tenant, holding under a lease assigned to him by the original lessee, had continuously occupied the land under successive leases and claimed to be a *raiyat* within the meaning of this Act, either with or without occupancy rights, the area leased being more than one hundred *bighas*, it was held by the Privy Council that the tenant was neither an occupancy nor a non-occupancy *raiyat* under this Act.—Bengal Indigo Company v. Raghubar, I.L.R. 24 cal. 272. It is only in cases of mere contracts for the cultivation of land let that the deed, which might be called a *sar-i-peshgi*, would create a raiyati interest (Ram Khelawan Rai *v.* Sambhu Rai, 2 C. W. N., 758). In one respect, an occupancy raiyat differs little from a middleman; he can sub-let the whole of his land without in any way forfeiting his own rights, or conferring any rights of occupancy on the sub-lessee—(Kali Kishore *v.* Ram Churun, 9 W. R., 3344.) So in Kali Churn *v.* Ameeruddin, Bayley, J., says: "I furthur think that the benefits of section 6 are not restricted to those who with their own hands till the soil, but extend to those who are *bonâ fide* actual cultivators in the sense that they derive the profits from the produce directly, and are not middlemen who have no connection with the produce, except by receiving the rents in cash or kind from those who directly derive their profits from the produce."—(Butabee Begum *v.* Khooral, 2 All., 24.) We have seen that in Karoo Lal *v.* Luchmeeput, 7 W. R., 15, it was held that whenever a difficulty of this kind appears, the origin of the holding should be looked to. In Uma Churun Dutt *v.* Umatara Debee, 8 W. R., 181, Seton-Karr, J., observed: "We think that the finding of the lower Courts as to the character of the tenure does not in law remove the defendant from the category of raiyats whose rents may be enhanced under section 6, Act X of 1859. The defendant took a potta to clear and cultivate a Sunderbun *chuck*, at a progressive rate of rent; and if he cleared some of the land not by his own labor, but by settling raiyats under him on the said *Chuck*, this does not alter the original character of his holding." (See also Hurrish Chunder *v.* Ram Chunder

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18 W. R., 528. A *raiyat* does not become a tenure-holder merely because, instead of cultivating the land, he erects shops on it and takes rent from the shop-keepers (Khujoorunnesa Begum *v.* Ahmed Reza, 11 W. R., 88; 9 B. L. R., 13.) Where land let for agricultural purposes has, with the consent of the landlord, ceased to be agricultural and the tenant has built a homestead or used part of it for tanks, the nature of the tenancy is not hereby changed.—Prosunna *v.* Jagannath 10 C. L. R. 25. But where land is let entirely for houses and buildings and not for agricultural purposes it does not come within the purview of this Act. Hence land granted under a lease merely for building purposes and for establishing a coal depôt was held not to come within the purview of this Act, since the lease was not for agricultural or horticultural purposes or for any of the purposes mentioned in section 5; and the lessee was held to be neither a tenure-holder nor a *raiyat* within the meaning of the Act.—Ranigunge Coal Association v. Jadunath I. L. R. 9 Cal. 489. The definition of "raiyat" given in this section is not exhaustive, and there is nothing in it to exclude a person who has taken land for horticultural purposes (Hari Ram *v.* Narsing Lal, I. L. R., 21 Cal., 129.)

Farmers of Government estates when tenure-holders.—"The farmer of an estate, which is the property of Government is a tenure-holder under the Bengal Tenancy Act, the payment which he makes being rent, as defined in section 3 (5), and not revenue. His lease cannot therefore be cancelled. It can only be determined by his ejectment decreed in a regular suit, and a condition in his lease permitting cancelment without a suit could not be enforced [sections 66, 89 and 178 (1) *(c)*]. The farmer of an estate belonging to a recusant proprietor, on the other hand, takes the place of the proprietor in entering into an engagement with the Government, and thus pays land revenue instead of rent. He is not therefore a tenure-holder, and his lease may be put an end to by cancelment on default, if it contains a stipulation to that effect (Board of Revenue's C. O., No. 9 of Sept., 1893.)

CHAPTER III.

TENURE-HOLDERS.

Enhancement of rent.

Tenure held since Permanent Settlement liable to enhancement only in certain cases.

6. Where a tenure has been held from the time of the Permanent Settlement, its rent shall not be liable to enhancement except on proof—

(*a*) that the landlord under whom it is held is entitled to enhance the rent thereof either by local custom or by the conditions under which the tenure is held, or

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(*b*) that the tenure-holder, by receiving reductions of his rent, otherwise than on account of a diminution of the area of the tenure, has subjected himself to the payment of the increase demanded, and that the lands are capable of affording it.

Shikmi tenures are not liable to enhancement except in cases herein specified.

The rent of Shikmi taluks or tenures existing at the time of the Permanent Settlement cannot be enhanced unless upon proof (1) of a special right by custom to enhance; or (2) of a right depending upon the conditions of the grant; or (3) that the talukdar by receiving abatement has subjected himself to increase, and the lands are capable of affording it. These rules were laid down in section 51 of Regulation VIII of 1793, which has been repealed by this Act, and have been embodied in the present section in clauses (*a*) and (*b*). Section 51 of Regulation VIII of 1793 ran as follows: "No zemindar or other actual proprietor of land shall demand an increase from the talukdars dependent on him, although he should himself be subject to the payment of an increase of *jumma* to Government, except upon proof that he is entitled so to do, either by the special custom of the district, or by the conditions under which the talukdar holds his tenure, or that the talukdar, by receiving abatements from his *jumma*, has subjected himself to the payment of the increase demanded, and that the lands are capable of affording it." The present section has substituted "local custom" for the "special custom of the district," "reduction of his rent," for "abatements from his jumma," and following the decisions of the Courts adds a special clause—"otherwise than on account of a diminution of the area of the tenure." Where a zemindar sues for enhancement under a notice, the grounds contained in it must be those contemplated in Regulation VIII of 1793, section 51—(Kristo Chunder *v.* Elahee Buksh, 20 W. R., 459; compare 12 B. L. R., 232; 15 B. L. R., 120; 13 Moore's I. A., 248; 19 W. R., 144; S. D. A. Rep. 1859, 677; S. D. A. Rep., 1857. 1413.)

The old section.

The new section.

This section is modified by section 49 of Regulation VIII of 1793 and section 50 of this Act.

The provision contained in this section is subject to the restrictions imposed by section 49 of Regulation VIII of 1793, and section 52 of this Act. Section 49 of Regulation VIII of 1793 prescribes: "It is to be understood, however, that istemraridars (mokuraridars) of the nature of those described in section 18, who have held their land at a fixed rent for more than twelve years, are not liable to be assessed with any increase either by the officers of the Government or by the zemindar or other actual proprieror of land, should he engage for his own lands. With regard to such istemraridars also, as have not held their lands at a fixed rent for so long a period, if the zemindar or other actual proprietor of land has bound himself by the deed, which he may have executed not to lay an increase upon them, he shall not be

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allowed to infringe the conditions of the deed for his own benefit, but must confine his demands to the rent he may have voluntarily agreed to receive"—See section 52 of the Act and the notes under it.

This section is modified by section 49 of Regulation VIII of 1793 and section 50 of this Act.

The provision contained in this section is subject to the restrictions imposed by section 49 of Regulation VIII of 1793, and section 50 of this Act. Section 49 of Regulation VIII of 1793 prescribes: "It is to be understood, however, that istemraridars (mokuraridars) of the nature of those described in section 18, who have held their land at a fixed rent for more than twelve years, are not liable to be assessed with any increase either by the officers of the Government or by the zemindar or other actual proprietor of land, should he engage for his own lands. With regard to such istemraridars also, as have not held their lands at a fixed rent for so long a period, if the zemindar or other actual proprietor of land has bound himself by the deed, which he may have executed not to lay an increase upon them, he shall not be allowed to infringe the conditions of the deed for his own benefit, but must confine his demands to the rent he may have voluntarily agreed to receive"—See section 50 of the Act and the notes under it. Tenures held from the time of the Permanent Settlement are *primâ facie* not liable to enhancement except on proof, &c., and under this section. If they are proved to be liable to enhancement, the tenant may again demand the presumption of Section 50; on the other hand, if they are exepmpted from enhancement under this section, section 50 will not render them liable to enhancement. In Hurro Nath *v.* Gobind Chunder 23 W. R., (P. C.) 352, their Lordships observe: "It may, however, be well to consider whether the High Court was right in holding that the defendant was, by section 15 of Act X of 1859, protected from enhancement in any case and upon any grounds. To bring the case within that section, he must hold his tenure otherwise than under a terminable lease, and he must also hold at a fixed rent, which has not been changed from the time of the Permanent Settlement. It should be remarked that section 15 does not render liable to enhancement dependent talukdars, who are exempted by section 51 Regulation VIII of 1793, but exempts from enhancement, amongst others, dependent talukdars who, under the provisions of that section, might otherwise be liable to enhancement." (See Nobo Kishore *v.* Pandul Sirkar, 8 W. R., 312; Dhunput Singh *v.* Guman Singh, 9 W. R., (P. C.) 3; Musst. Mahamaya *v.* Mussamut Dayamayi 7 W. R., 63).

Tenures held from the time of the Permanent Settlement.—The most important of these tenures are taluks. Some of these have existed from before the Permanent Settlement, and are known by the generic term *shikmi mokurari* or dependent taluks. The existence of these taluks, is traceable in sections 6 to 8 of Regulation VIII of 1793, which have been repealed by Act XVI of 1874. Section 6 provided: "The proprietors of taluks who now pay the public revenue assessed upon their lands through a zemindar or other actual proprietor of land, and whose title-deeds contain a clause stipulating that their revenue is to be paid through him, shall continue to pay their revenue through such zemindar or other actual proprietor of land as heretofore." Section 7 provided:

Shikmi taluks or tenures as distinct from proprietary taluks.

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"Talukdars whose taluks are held under writings or sunnuds from zemindars or other actual proprietors of lands, which do not expressly transfer the property in the soil, but only entitle the talukdar to possession, so long as he continues to discharge the rent, or perform the conditions stipulated therein, are considered as lease-holders only, not actual proprietors of the soil, and consequently are not entitled to be rendered independent of the zemindar or other actual proprietor of land, from whom they derive their tenure, provided they now pay the rent assessed upon their taluks to him." And s. 8 provided: "Talukdars also whose tenure is denominated *jungleboori*, and is of the following description, are not considered entitled to separation from the proprietors of whom they hold. The pottas granted to these talukdars, in consideration of the grantee clearing away the jungle, and bringing the land into a productive state, give it to him and his heirs in perpetuity, with the right of disposing of it, either by sale or gift, exempting him from payment of revenue for a certain term, and at the expiration of it, subjecting him to a specific *assul jumma* with all increases, *abwabs* and *mahtotes* imposed on the pergunnah generally; but this for such part of the land only as the grantee brings into a state of cultivation; and the grantee is further subject to the payment of a certain specified portion of all complimentary presents and fees, which he may receive from his under-tenants, exclusive of the fixed revenue. The potta specifies the boundaries of the land granted but not the quantity of it, until it is brought into cultivation." Sections 5 and 9, which have also been repealed by Act XVI of 1874, described talukdars who were considered proprietors and not merely tenure-holders. Section 5 provided: "*First.*—The talukdars to be considered actual proprietors of the lands composing their taluks are the following: *Second.*—Talukdars who purchased their lands by private, or at public sale, or obtained them by gift from the zemindar, or other actual proprietor of land to whom they now pay the revenue assessed upon their taluks, or from his ancestors, subject to the payment of the established dues of Government, and who received deeds of sale or gift of such land, from the zemindar, or sunnuds from the *khalsa*, making over to them his proprietary rights therein. *Third.*—Talukdars whose taluks were formed before the zemindar or other actual proprietor of land to whom they now pay their revenue, or his ancestors, succeeded to the zemindari. *Fourth*—Talukdars, the lands comprised in whose taluks were never the property of the zemindar or other actual proprietor of the soil to whom they now pay their revenue, or his ancestors. *Fifth.*—Talukdars who have succeeded to taluks of the nature of those described in the preceding clauses by right of purchase, gift or inheritance from the former proprietors of such taluks." Section 9 prescribed: "The rules in s. 5, respecting taluks, have also been extended to *ayma* lands liable to the payment of a fixed quit revenue, denominated *malgusari ayms*; and agreeably to the distinctions laid down in that Section, it has been ordered that such *malgusari ayma* tenures as are held under grants of the Mahomedan Government, previous to the Company's accession to the Dewany, or which have been since granted by proprietors of estates for a consideration received by them, are to be separated from the proprietors to whom their revenue is now paid, as coming within the spirit of the rules for the separation of talukdars, who are proprietors of the lands composing their taluks. But *malgusari ayma* tenures, which may appear to have been

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bond fide granted for the purpose of bringing waste lands into cultivation, shall continue included in the estates to which they are now annexed, as coming within the rules in s. 8. respecting jungleboori taluks." In a suit for arrears of rent at an enhanced rent even if the defendants can show that they are dependent talukdars, s. 51 of Reg. VIII of 1793 will not apply to them, unless they can distinctly prove that their tenure existed and was capable of being registered at the date of the Decennial Settlement.—Ishan *v.* Harish 24 W. R., 146. But it is not necessary to show that it was "registered," it is sufficient to show that the tenure existed and was capable of being registered at that time.—(Bama Sundari *v.* Radhika, 13 W. R., P. C. 11; 4 B. L. R., P. C., 8; 13 Moo. I. A., 248; Nil Mani Singh *v.* Ram Chakravarti, 21 W. R., 439). The fact of the mention of a tenure in a *jamabandi* paper prepared seven years before the decennial settlement is presumptive evidence of its existence twelve years before the decennial settlement (Romesh Chandra Dutta *v.* Madhu Sudhan Chakravarti, 5 W. R., 252). On the other hand, the fact that a *taluk* is not mentioned in the decennial or quinquennial settlement as such, and that the lands are included in the decennial settlement as part of the *semindari* does not afford any strong evidence against the existence of the *taluk*, for, being only a *shikmi taluk*, paying rent to the *semindar*, the *talukdars* were not required to mention it, nor was it necessary for the *semindar* to do so (Wise *v.* Bhubanmayi Debi, 10 Moo. I. A., 174; 3 W. R., P. C., 5). A decree of the Sudder Dewani Adalat in 1805 declared that a *taluk* was fit to be separated from the *semindari*, of which it had originally been part, according to the provisions of section 5, Regulation VIII of 1793. The decree directed that until separation rent should be paid by the *talukdar* to the *zemindar* according to the *jama* already assessed upon the *taluk*, this revenue to be, on the separation being effected, deducted from that assessed upon the *semindari*, Proceedings with a view to separation then continued, but litigation and delays ensued with the result that no separation had been effected when suits were instituted in 1882 and 1885, in which the holders of shares into which the *semindari* had been partitioned claimed to enhance the rent on the *taluk*. It was held that the decree of 1805, acted upon for many years, was conclusive that the *taluk* was not dependent on the *semindari*, but was an independent one within section 5, Regulation VIII of 1793 and that, therefore, the *semindars* had no right of enhancement.—(Hemanta Kumari Debi v, Jagadendra Nath Rai, I. L. R., 22 Cal. 214; L. R., 21 I. A., 131).

Tullubi Bromottur.

The holder of a *maghdee* or a *tullubi bromottur* or a permanent and transferable intermediate tenure which has been in existence from the time of the decennial settlement is entitled to a notice under section 51 of Regulation VIII of 1793—(Raja Nilmoni *v.* Ram Chukravarti, 21 W. R., 439.) It is not a lakhiraj tenure, but the holder is entitled to the benefit of this section - (Raja Nilmoni *v.* Chunder Kant, 14 W. R., 251); Dina Nath *v.* Gogun Chander 14 W. R., 274). A *tullubi bromottur* has been held as such from the time of the decennial settlement and is a permanent intermediate tenure entitling the holder to a notice of enhancement under Regulation VIII of 1793—(Nilmoni *v.* Chunder Kant, I. L. R., 2 Cal., p. 115;

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25 W. R., 200.) Where grants of land had been made prior to the Permanent Settlement on ghatwali tenure at a fixed rent, and the Government subsequently dispensed with the services on the part of the zemindar, *Held* in a suit by the zemindar to enhance the rents, that as long as the ghatwals were able and willing to perform the services, the zemindar had no right to enforce payment of an enhanced rent on the ground that the services were no longer required. The ghatwals are dependent talukdars within the meaning of Regulation VIII of 1793. and are protected from enhancement by clause 1 of section 51 of that Regulation—(Leelanund *v.* Thakur Munorujnun, I. L. R., 3 Cal., 251.) A taksheeshi taluk is an intermediate tenure which can be protected under this section.—(Sreemoti Jannobi *v.* Grish Chandra, 15 W. R., 335.) But the section applies to tenures held from the time of the permanent settlement and not to raiyati holdings. *Kadimi* or old (*i.e.*, occupying by its hereditary descent) raiyats do not fall within this section, and their Lordships of the Privy council expressly said that they were not prepared to affirm a remark of the Sadar Dewani Adalat that the analogy of this section extends to them.—(Ram Chunder *v.* Jogesh Chunder, 19 W. R., P. C., 353; 12 B. L. R., 239; 2 P. C. R., 836: Ishan Chunder *v.* Hurish Chunder, 24 W. R., 147.) Section 51, Reg. VIII of 1793, refers solely to dependent talukdars, and does not protect from enhancement persons whose tenures are terminable at the end of any year or at the pleasure or caprice of their zemindars.—(3 W. R., 172.) Nor does the section apply to taluks held under writings, sunnuds or other documents granted by proprietors, which do not expressly transfer the property in the suit. These persons, as will be seen from s. 7, are treated under Reg. VIII of 1793 as lease-holders only.—(Rajah Satyanund *v.* Huro Kishore, 15 W. R., 474.)

Ghatwali tenures.

Taksheeshi taluk.

Kadimi raiyats.

Terminable tenures.

In a suit for enhancement under Reg. VIII of 1793, the onus is on the zemindar to prove that a dependent talukdar is liable to enhancement, the nature and extent of proof varying according as the tenure falls within s. 49 or 51. To bring a taluk within s. 51 it is sufficient to show that the tenure existed and was capable of being registered at the date of the decennial settlement.—(Bama Sundari *v.* Radhika, 13 W. R. P. C., 11; 2 P. C. R., 293; 13 Moo., 248; 4 B. L. R. P. C., 16.) This case was decided under the law before the passing of Act X of 1859. It was here held that actual registration under the 48th section is not essential to the existence of a taluk under the 51st section; and that proof of the existence of such a taluk at the time of the decennial settlement throws on the zemindar the burden of proving that the rent is variable. It was remarked in the same case that a suit to enhance the rent proceeds on the presumption that a zemindar holding under the perpetual settlement has the right from time to time to raise the rents of all the rent-paying land within his zemindari according to the pergunnah or current rates, unless, either he is precluded from the exercise of that right by a contract binding on him, or the land in question can be

Onus of proof.

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brought within one of the exemptions recognised by Bengal Reg. VIII of 1793.—(Gopal Lall *v.* Teluk Chundra, 10 Moo., I. A., 183; Susti Churun *v.* Ishan Chunder, 22 W. R., 383.) In a suit for enhancement of rent in respect of land which the defendant claims to hold as a dependent taluk, the onus is upon the zemindar to show that the land was included in the zemindari at the time of the Permanent Settlement.—Ahsanulla *v.* Basanta I. L. R., 10 Cal. 920. A defendant having admitted that he is a tenant, the onus is upon him to show that his tenancy is such as he sets up, viz. a permanent tenancy at a rate which cannot be enhanced.—(Khetra *v.* Dinendra, 3 C. W. N. 202.) The plaintiff is to start his case by proving that the existing rent is below the customary rate.—(Hem Chandra *v.* Kali Prasanno, I. L. R., 26 Cal. 832.) To bring a taluk within s. 51 it is sufficient to show that the tenure existed and was capable of being registered at the date of the decennial settlement.—Bama Sundari *v.* Radhika, 13 W. R. P. C., 11; 2 P. C. R., 293; 13 Moo., 248; 4 B. L. R. P. C., 16.) Section 51, Reg. VIII of 1793, could not apply to tenures the holders of which cannot show that their tenure existed, and was capable of being registered at the date of the decennial settlement.—(Ishan Chunder *v.* Harish Chander, 24 W. R., 146; Nilmoni Singh *v.* Ram Chukravarti, 21 W. R., 439.) A dependent talukdar, whose tenure was in existence before the Permanent Settlement, is entitled to protection under s. 49, Reg. VIII of 1783, unless his zemindar can prove a title to enhancement under s. 51.—(1 W. R., 367.) Under s. 49, Reg. VIII of 1793, a suit for enhancement is barred by proof of the existence of a tenure from the decennial settlement, unless the plaintiff is an auction-purchaser, in which case he must show when he purchased, before he can insist on proof of the existence of the tenure twelve years before the settlement.—(Romesh Chunder *v.* Madhu Sudan, 5 W. R., 252.) The mention of a tenure in a jamabandi prepared seven years before the decennial settlement affords presumption of the existence of the tenure twelve years before that settlement. (*Ib.*) A patnidar is protected from enhancement under s. 15, Act X, notwithstanding a decree passed before that Act by which the zemindar was declared entitled to enhance, the latter having omitted to take any effectual step before that Act to vary the rent since the decennial settlement.—(Gobind Chunder *v.* Huro Nath, 5 W. R., Act X, 10.) A declaration in a former suit, that the defendant's taluk is not protected from enhancement either under s. 16 or 77, Act VIII of 1169 (B.C.), does not relieve the plaintiff from the necessity of proving a case under section 51, Regulation VIII of 1793, under which alone he can maintain his suit—(Susti Churun *v.* Ishan Chunder, 22 W. R., 383. See also Ram Kumar *v.* Khajah Abdul Gunny, 2 Sev., 840; Radhika *v.* Bama Sundari 1 W. R., 339; and on appeal to the Privy Council, 4 B. L. R., P. C., 8, and 13 Moo. In. Ap., 49.)

The nature of proof required.

"The defendant said that he was a shamilat talukdar, as would seem to be the substance of the allegation within the meaning of section 5, Regulation VIII of 1793. * * * We think this case must be remanded to the Judge, and he will find upon the evidence, *firstly*,—whether the defendant is or is not a talukdar of the nature described in section 5, Regulation VIII of 1793. If

Procedure to be adopted in a suit for enhancement where defendant pleads that he is a shamilat talukdar.

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the Judge should find in favor of the defendant on this point, he will dismiss the plaintiff's suit. If he finds against the defendant, then it will be his duty to see whether the defendant is or not a dependent talukdar protected by the provisions of section 51, Regulation VIII of 1793. If the Judge find in favor of the defendant on this point, he will dismiss the plaintiff's suit, because no notice within the meaning of the section quoted has been served upon the defendant in this instance. If the Judge should find against the defendant on this second point also, then it will be his duty to see whether the defendant is a person protected by the provisions of section 16, Act X of 1859, and on this point both the parties will be given opportunity of adducing evidence *pro* and *con*. If again the Judge should find that the defendant is a person protected by the provisions of section 16, he will dismiss the plaintiff's suit. If he should find adversely to the defendant on this point also, then it will be his duty to determine what is the fair and equitable enhanced rent, if any, within the terms of the notice"—(Sharoda Prosanno *v.* Bipin Bihari 13 W. R., 71.) A dependent talukdar sued for enhancement is entitled to a finding not only on the question whether by proving holding for twelve years before the Permanent Settlement, he can put the plaintiff out of Court, but also on the question whether by holding from the Permanent Settlement, he cannot claim the protection given by section 51 (Regulation VIII of 1793.—1 W. R., 37. See also Sevestre, 175).

Are dependent talukdars protected from an increase of rent in respect of accretions by alluvion to their taluks?

This difficult question was discussed in the case of Jugut Chundar Dutt *v.* Panioty, 8 W. R., 427, and 9 W. R., 379, which came before the Calcutta High Court three times in appeal and once in review. Plaintiffs sought to enhance the rent of the defendants, alleging that the latter held a temporary (*gair bandobusti*) zimma taluk within their estate; that by the action of the river a new chur had been formed which defendants held, thereby occupying 40 droons of land in excess of the zimma. Defendants pleaded that these 40 droons were not an accretion, but a portion of the zimma which had diluviated and reformed on its original site. The lower Appellate Court held that this suit could not lie, as brougnt under Act X of 1859. The High Court on appeal reversed this decision and remanded the case for retrial on the merits, whereupon the lower Court found, among other points, that the 40 droons of land was an *accretion* and not a *re-formation*. On a second appeal to the High Court, it was urged that such accretion, as an increment to the original tenure, was protected, and that with advertence to section 4, Regulation XI of 1825, a single demand of rent could only be made for the whole estate, and therefore there could be no increase. As to this latter contention, the High Court remarked that so far from this section saying that accretions to a subordinate tenure shall be rent-free, it expreesly declared them liable for rent, if payable by usage or contract. The case was then remanded to try, amongst other points, 1st, whether defendant had proved his right to hold the zimma tenure at a fixed rent under sections 15 and 16 of Act X of 1859, 2nd if the zimma tenure were held at a fixed rent, is it according to the custom of the country liable to any, and if so, what, increase on account of alluvion? (6 W. R., Act X, 1848.) The lower Appellate Court decided that defendants had proved themselves entitled to the benefit of the

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presumption of law in section 16, Act X of 1859, and were therefore entitled to hold the zimma tenure at a fixed rent. It also found (apparently not trying the exact issue laid down on remand) that there was no custom proved under which the accreted land could be held rent-free; and held that in the absence of proof of such a custom, the tenant was liable to pay rent therefor. The High Court remarked that the burden of proof had been thus wrongly put upon the defendants who held the zimma tenure; yet as the plaintiff had sued for a kabuliyat on an alleged right to assess the accreted land, it was for him to have proved this allegation. On this ground, judgment was given for defendants. The Court further proceeded to hold that reading together section 51, Regulation VIII of 1793, section 4, Regulation XI of 1825, and section 15, Act X of 1859. the zemindar was not entitled to assess (*i. e.*, to claim an increase of rent in respect of) the accretions to the defendant's zimma tenure (18 W. R., 427.) A review of judgment was asked for, and the points raised above were argued. The Court refused to alter their former judgment; but this judgment was based mainly on the 1st of the above grounds. Mitter, J., expressly said that his remarks as to the accretion being liable to rent were to be regarded as an *obiter dictum*. Bayley, J., however, observed that section 17, Act X of 1859, could have no bearing upon the case, as being applicable to raiyati tenure only, and not to those of a taluki character; that he was not shown, nor was he aware of any law, except section 51, Regulation VIII of 1763, which provides for the assessment of such accretions; that clause 1, section 4, Regulation XI of 1825, leaves the substantive law on this point exactly as it was before; and that holders of the nature of the defendants are not liable under section 15, Act X 1859, until it be shown that their tenures were created subsequent to the decennial settlement, and held not at a fixed jumma (9 W. R., 379). As to the present law on the subject, see section 52 and notes. See also Baboo Gopallal Thakur *v.* Kamar Ali, 6 W. R., Act X, 1885, where the taluk having been recently created, and therefore not protected by section 15, Act X of 1859, the Court observed that the question would mainly depend upon the engagements of the parties. A zemindar sued to enhance the rent of a talukdar, and in 1860 the late Sadar Court affirmed his right to enhance, though from his failure to serve the notice required by law, the talukdar was not then liable to pay rent at any enhanced rate. He then proceeded under Act X of 1859 to enforce payment of an enhanced rate of rent, grounding his right to do so on the decree on the Sadar Court. It was held that he could not succeed, the High Court remarking as follows: "We think that the right of the plaintiff suing under Act X of 1859, with this decree in his hand, stands no higher than the right of any other landlord, who, previous to the passing of the Act, would have a good right to enhance, but whose right by the passing of the Act was taken away. He has taken no effectual steps by which the rent has been raised since the decennial settlement, and the legislature has stepped in and finally protected the talukdar"—(Gobind Chunder *v.* Hara Nath 1 In. Jur., 52, upheld on appeal by the Privy Council, 2 L. R., I. A., 193, and 23 W. R., 353.)

Ijaradar. **Enhancement of rent by Ijaradar:**—Unless there is an express stipulation against the enhancement of rent by an ijaradar he can ex-

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ercise that power (Doorga Prasad *v.* Joy Narain, 2 Cal. 474; Rushton *v.* Girdharee, 21 W. R. 46.)

Receiving reductions.

Receiving reductions:—When there was a simple statement of the plaintiff that by degrees the rents became less and he was entitled to claim an enhancement, held that this was not the statement contemplated by s. 51 of Reg. VIII of 1819—(Naba Krista *v.* Taramanee 12 W. R. 320.)

Partition of tenure:—When by the original arrangement there was one tenancy under one holding, *held* that it came to an end when the parent estate was partitioned and the effect of the partition was to create separate and distinct tenancies under the proprietors of each of the estates, and s. 188 would not preclude one of the proprietors of distinct estates from maintaining a suit for enhancement.—(Hem Chandra *v.* Kali Prasanna, 26 Cal. 832.)

No provision for an abatement or reduction of rent:—As to whether a talukdar is entitled, to abatement of rent on the ground of diluvion Peacock, C. J., said: "We think he is so entitled, unless there was an express stipulation that he should not, whether the land was washed away or not. If a man stipulates to pay rent it is clear he engages to pay it as a compensation for the use of the land rented; and independently of s. 15, Act X of 1859, we are of opinion that, according to the ordinary rules of law, if a talukdar agrees to pay a certain amount of rent, the tenant of it is exempt from the payment of the whole rent if the whole of the land be washed away, or a portion of the rent, if a portion only be washed away."—(Assaruddin *v.* Sharashibala, Marsh., 1558.) On both these points, see. however, s. 52, *post*, which is an assessment section.

Notice of enhancement not now required

Notice not necessary:—Notices of enhancement are no longer required. "Such a large percentage of enhancement cases have failed because it was not found that the notice had been served, or because the notice was defective in form, that it has appeared to be highly expedient to do away with a detail, the practical result of which has been to delay and impede a decision of the real question at issue between the parties. We have accordingly made the institution of the enhancement suit to be notice to the tenant." (R. C. R.)

Limits of enhancement of rent of tenures.

7. (1) Where the rent of a tenure-holder is liable to enhancement, it may, subject to any contract between the parties, be enhanced up to the limit of the customary rate payable by persons holding similar tenures in the vicinity.

(2) Where no such customary rate exists, it may, subject as aforesaid, be enhanced up to such limit as the Court thinks fair and equitable.

(3) In determining what is fair and equitable, the Court

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shall not leave to the tenure-holder as profit less than ten per centum of the balance which remains, after deducting from the gross rents payable to him the expenses of collecting them, and shall have regard to—

(*a*) the circumstances under which the tenure was created; for instance, whether the land comprised in the tenure, or a great portion of it, was first brought under cultivation by the agency or at the expense of the tenure-holder or his predecessors in interest, whether any fine or premium was paid on the creation of the tenure, and whether the tenure was originally created at a specially low rent for the purpose of reclamation; and

(*b*) the improvements, if any, made by the tenure-holder or his predecessors in interest.

(4) If the tenure-holder himself occupies any portion of the land included in the area of his tenure, or has made a grant of any portion of the land either rent-free or at a beneficial rent, a fair and equitable rent shall be calculated for that portion and included in the gross rents aforesaid.

Liable to enhancement. See notes under s. 6 and subsection 8 of s. 3 *ante*.

May be enhanced.—There is much conflict of decisions on the question whether co-sharers are entitled to sue for enhancement of rent. (See s. 188 and notes *post*.) The earlier decisions seem to be that one of several joint proprietors of an estate can not maintain a suit for enhancement of his share of the rent without a butwara—. (Troylochotaran *v.* Mathura Mohun, Sp. W. R. (Act X), 41; 2 R. J. P. J., 202; Ram Lochun *v.* Aetambur, Sp. W. R. (Act X), III.) So the proprietor of a fractional share of an undivided estate has a right to sue for a kabuliyat for such share, if he can prove that the defendants have heretofore recognized him as the proprietor of a particular share and paid him separately a certain proportion of the rent.—(Romanath *v.* Chand Huri, 14 W. R., 432; 6 B. L. R., 356, S. C. So also Gunganarain *v.* Sharoda Mohan, 12 W. R., 30; 3 B. L. R. A. C., 230; Rakhal Chunder *v.* Mahtab Khan, 25 W. R., 221; and Doorga Prosad *v.* Joynarain, I. L. R. 2 Cal., 474 (overruled). See I. L. R., 3 Bom., 23.) *Per contra* in Sarat Sundari *v.* Watson, 2 B. L. R., A. C., 159, 11 W. R. 25, it was decided that neither Act X of 1859 nor any decision of the High Court gives authority to a party who is entitled to a fractional share of an undivided estate, though he may be receiving a definite portion of the rent from the tenant or raiyat, to maintain a suit for kabuliyat in respect of such undivided share. The Rent Law

Are co-sharers entitled to sue for enhancement of rent?

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contemplates only the giving of pottas of entire holdings and kabuliyats of entire rents. (So also in Udaya Churn *v.* Kali Tara, 2 B. L. R., Ap., 52; II W. R., 393); and a single co-sharer cannot sue for his share of rent, much less for enhanced rent.—(Bhyrub *v.* Gogaram, 17 W. R., 408; Haradhan *v.* Ram Newaz, (*ib.*), 414, Raj Chunder *v.* Rajaram, 22 W. R. 385. See also Indur Chundra *v.* Brindaban Behara, 15 W. R. F. B., 21; 8 B. L. R. 251.) The point may now be considered as settled by the Full Bench decision in the case of Gunee Mahomed *v.* Moran, and Durga Prosad Mytee *v.* Joinarain Hazarah, I.L.R. 4 Cal., 96, F. B. In this case, the learned Chief Justice (Garth, C. J.) observes: "It has been constantly held in this Court, and must be considered now as well-established law, that each co-sharer may bring a separate suit against the tenant for his share of the rent (when he is in the habit of collecting rent from him separately). But in the absence of such an arrangement it is equally clear that no such suit can be maintained. (See Ganganarain Dass *v.* Saroda Mohan Roy Chowdry, 3 B. L. R. A. C., 230; 12 W. R. 30; Sree Misser *v.* Crowdy, 15 W. R., 243; Deno Bundhoo Kundoo Chowdry *v.* Deno Nath Mukerji, 19 W. R, 168; and Musst. Lalan *v.* Hemraj Singh, 20 W. R., 76. But a suit for a kabuliyat under such circumstances by one co-sharer against the tenant is a very different thing from a suit for arrears of rent. The separate suit for arrears, as I have already said, is perfectly consistent with the continued existence of the original lease of the tenure. A kabuliyat, by which an entirely new and separate tenancy is created is obviously inconsistent with it. A suit for arrears deals only with the past. A suit for kabuliyat binds the tenant in the future. In fact it is binding upon both parties, because the co-sharer who obtanis a kabuliyat is bound, at the request of the tenant, to give him a potta upon the same terms, and the grant and acceptance of a binding lease of the separate share cannot exist contemporaneously with the original lease of the entire jote. This is quite in accord with the view of Norman, acting C. J., and Dwarkanath Mitter, J., in the Full Bench case of Indur Chunder Dugar *v.* Brindaban Behara, 15 W. R., 21, in which Mr. Justice Mitter points out the distinction between a mere separate payment of rent to a co-sharer and a claim for a kabuliyat as to the separate share. The only authority to the contrary appears to be the decision of Bayley and Paul, JJ., in the case of Romanath *v.* Chand Huri (6 B. L. R., 356: 14 W. R. 432), but it is not clear from that case, whether the tenure had ever been held an entire rent; and at any rate the distinction between a separate payment of rent by arrangement, and a binding lease of a separate share, does not seem to have been considered. Of course if the original lease of the entire tenure is cancelled, or put an end to by the consent of all the parties, the co-sharer and the tenant are at liberty to enter into any fresh contracts which the law allows; but no Court of Justice ought to presume such a cancellation or determination of the lease from the mere fact of a separate payment of rent to one or mere of the co-sharers. The right of one co-sharer to enhance the rent of his share separately must be governed by the same principles as his right to a kabuliyat. The Rent Law, in our opinion, does not contemplate the enhancement of a part of an entire rent; and the enhancement of rent of a separate share is inconsistent with the continuance of the lease of the

The point is settled.

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entire tenure." One co-sharer cannot (even if he make his co-sharers parties to his suit) sue for the enhancement of his share of the rent, such an enhancement being inconsistent with the continuance of the lease of the entire tenure.—(Bharut Chunder *v.* Kally Das, I. L. R., 5 Cal., 574.) The Full Bench ruling was held not applicable where the butwara proceedings did effect such a complete change in the nature of the original tenure as to create three new tenancies in the place of the old one.—(Sarut Sundari *v.* Annund Mohan, I. L. R., 5 Cal., 273.) One co-sharer is not competent to issue a proper notice of enhancement without the consent of other co-sharers previously obtained, though the rent has been paid to each co-sharer separately. Under the Full Bench ruling, he must first establish his right to a separate contract to recover his rent separately on his individual share.—(Kashee Kishor *v.* Alip Mundle, I. L. R., 6 Cal., 149.)

Subject to any contract between the parties.—Where in a suit for enhanced rent after notice, it appeared that a *howladari amulnama* had been granted at defendant's request, without any rent for the first year, at varying rates less than a certain rate up to 1264, and at that certain rate afterwards it was held that the rent was not liable to enhancement beyond that certain rate.—(Shoora Sundari *v.* Golam Ali, 19 W. R., P. C., 141; 2 P. C., 794. See also I. L. R., 3 Bom., 154.) In a lease of a jungleboori howla tenure which provided that the lands covered by it should be held rent-free for five years, and that after a low rate had been paid for one year, the *poora dustoor* should be paid, their intention was construed to be that, inasmuch as the raiyat was bringing those lands into cultivation for the first time, he should for a certain period either pay no rent or something less than customary rates, but the landlord did by this bind himself never to enhance the rate under certain circumstances.—(Bhurut Chandra *v.* Gour Mani, 11 W. R., 81; compare Kaseemuddi *v.* Nuddi Ali, 11 W. R, 164.) Where one of several joint tenants had agreed to pay an enhanced rent and the rent had been paid for four years; *held* that it might be assumed that the co-sharers had acquiesced in the arrangement made.—Burhunuddi *v.* Mohun Chunder, 8 C. L. R. 511; but where one of several joint tenants executed a kabuliyat at an enhanced rent for the entire tenure; *held* that he could not be made liable for enhanced rent in respect of any share exceeding his own share:—Ram Tarun *v.* Asmutulla, 6 C. W. N. 111. Where the landlord had obtained a decree for enhancement of rent and subsequently the landlord and the tenant made a fresh arrangement between themselves and in pursuance of this arrangement, a *kabuliyat* was executed by the tenant by virtue of which the tenant was allowed to hold a lease at a less rent for a certain number of years on certain conditions, and if the conditions were not fulfilled then the whole rent fixed by the decree would be levied, *held* that the arrangement embodied in the *kabuliayt* had the effect of superseding the enhancement decree; and that, upon the expiry of the term of the *kabuliayt*, if the landlord sought to enhance the rent, he must do so by having recourse to the procedure laid down by the Rent Law:—Nobin Chunder *v.* Gour Chunder, 8 C. L. R. 161.

Up to the limit of customary rate.—This sub-section gives discretion to

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the Court. The maximum is only provided, and it does not follow that the Court shall in every case force up the rent of a tenure to the customary rate. Something less than the customary rate may possibly be given. This view, however, is rendered doubtful by sub-section 2, which provides that the Court can determine a fair and equitable rate only where no customary rate exists. The question then arises where a customary rate does exist, cannot the Court award a rate which it thinks fair and equitable? or following the great Rent Case, should it be supposed that, where a customary rate exists, that is the fair and equitable rate? (See the Great Rent Case, B. L. R. Supp. Vol., 202.) Customary rate is the relic of the old pergunnah rate. We find the first mention of it in s. 60, cl. 2 of Reg. VIII of 1793, where the *khudkasht* raiyat's potta is liable to be cancelled on proof that the rents paid by them within the last three years have been reduced below the rate of the *nirkbundi* of the pergunnah. So an auction-purchaser under s. 5, Reg. XLIV of 1793, quoted under s. 6 of this Act, is at liberty to collect from dependent talukdars, and from raiyats or cultivators of the lands let in farm, &c., whatever the former proprietor would have been entitled to demand "according to the established usages and rates of the pergunnah or district in which such lands may be situated." Mr. Colebrooke in a Minute (1st May, 1812) remarked: "In cases where pottas are set aside or cancelled under the rules above quoted, as well as in other similar instances, it is provided that the rent or revenue to be demanded shall be determined by the rates and usages of the pergunnah or district and the raiyat is entitled to require a renewal of his potta upon those terms. This would be very unexceptionable if, as is here supposed by the Regulations, the proportion of the annual produce in money or kind, constituting the revenue demandable as the due of Government, could be with certainty determined, and if the rents which the landlord may properly ask, according to the established rates and usages of the pergunnah, were accurately ascertainable. For the interests of the cultivator and tenant would be sufficiently protected and secured if the established rules and rates of the pergunnah according to which he is pronounced entitled to demand the renewal of the lease, and according to which the Courts of Justice are required to decide disputes arising between landlord and tenant, were either known or ascertainable. But there is reason to presume that the pergunnah rates are become very uncertain. In several cases of magnitude which were perseveringly contested by tne parties, it appeared from proceedings which came before the Sadar Dewani Adalat while I sat in that Court, that in a district or province in which dependent talukdars are particularly numerous, no rule of adjustment could be discovered after the most patient enquiry conducted by a very intelligent public officer. From the proceedings held in numerous other cases in the Courts of Justice, the same conclusion may be drawn respecting the relative situation of the raiyat and zemindar in most districts. In some, indeed, a rule of adjustment may still be found in full force and actual operation. The Regulations of Benares have maintained the table of rates of 1187 Fusli, and the Kanungo office yet exists in that province for its preservation. In the vicinity of Calcutta

Discretion of the Court.

Customary rate.

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the raiyats have been, I understand, supported by the decisions of Adalats (Courts) in their pretensions to hold their lands upon the rents payable by them, or by the persons whose representatives they are according to the last general measurement which was undertaken with the authority of Government before the Permanent Settlement, and of which the record is understood to be preserved in the office of the Collector of the 24-Pergunnahs. Other instances may exist, but they are few, and the position, as a general one, is unquestionably true that there is actually no sufficient evidence of the rates and usages of pergunnahs which can be now appealed to for the decision of questions between landholders, and raiyats." He therefore proposed "that provision shall be made by Regulation for cases where the pergunnah rates are not ascertainable, which should regulate the pottas of *khudkasht raiyats*, or of other persons entitled to a renewal of their leases. This will silently substitute a new and definite rule in place of ancient but uncertain usages. The following are the rules which I should propose with these views:—(1) in any instance where a *khudkasht raiyat*, or other occupant or tenant may be entitled, under the existing Regulations to receive a renewed potta, in consequence of the cancelling of former *pottas* by reason of a public sale for the recovery of the arrears of revenue, or in consequence of any other circumstances rendering requisite the renewal of pottas according to the rates of the pergunnah, as well as in every case in which the landholder, farmer, or other person in charge of the collections authorized to collect according to the rates of the pergunnah in place of subsisting engagement; if in any such case or instance, it shall not appear that established rates are known in the pergunnah or other local division, within which the land is situated, or if those rates shall not be ascertainable owing to long disuse or insufficient evidence of them; then, and in every such instance, the renewed potta shall be granted and the collection made in the case of an individual raiyat or tenant, at such rate or rates as are paid or payable for other land of similar description, and as near as may be of the same quality in the vicinity; but in the case of cancelling generally the pottas of the *raiyats* and tenants of the whole estate, or of an entire *mousah*, or other local division of the country, the new pottas shall be granted, and collections made at rates not exceeding the highest rate paid for the same lands in any one year within the period of three years last past, antecedently to the date of cancelling the pottas. (2) In the case of a dependent talukdar, if the rent of the land be computed according to the rates payable by raiyats or cultivators for land of similar quality and description, a deduction shall be allowed from the gross rent, in the adjustment of the jumma of such dependent taluk at the rate of ten per cent. of the talukdar's profit or income, over and above a reasonable allowance for charges of collection, according to the extent of the taluk." These recommendations were adopted and incorporated in Regulation V of 1812. The preamble of this enactment recited that it had been deemed advisable to revise the rules established regarding the grant of pottas by proprietors of land paying revenue to Government, to their tenants and, also the rates at which persons purchasing land at the public sales were entitled to collect their rents, and that there were grounds to believe that considerable abuses and oppression had been committed by zemindars, talukdars, and farmers

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of land in the exercise of powers vested in them with respect to the distress and sale of the property of their tenants for the recovery of arrears of revenue. The Regulation then declared proprietors of land competent to grant leases for any period which they might deem most convenient to themselves and tenants, and most conducive to the improvement of their estates. They were also declared competent to grant leases to their dependent talukdars, under-farmers and raiyats, and to receive corresponding engagements for the payment of rent according to such form as the contracting parties might deem most convenient and most conducive to their respective interests, provided, however, that this should not be construed to sanction or legalise the imposition of arbitrary or indefinite cesses. All such stipulations were to be null and void, but the Courts were, notwithstanding, to maintain and give effect to the definite clauses of the engagements contracted between the parties, or in other words, to enforce payment of sums specifically agreed between them. Persons attaching land on the part of Government, and purchasers at the public sales, were forbidden to annul existing leases within the year, on the ground that they were collusive, without obtaining a decision to this effect in a Court of Justice. The Regulation then referred to the provisions of the pre-existing law, under which purchasers at revenue sales were entitled to collect, during the year in which the sale took place, whatever the former proprietor would have been entitled to receive "according to the established usages and rates of the pergunnah or district in which such lands may be situated," and recited that there was reason to believe that, the pergunnah rates had in many cases become uncertain. It accordingly provided that, when any known established pergunnah rates existed, they should determine the amount of rent to be received by purchasers at public sales, and persons attaching lands on the part of Government, where no such established pergunnah rates were known, pottas were to be granted, and the collections made according to the rate payable for land of a similar description in the places adjacent. If the leases and pottas of tenants of an estate generally which consisted of an entire village or other local division, were liable to be cancelled, new pottas were to be granted, and collections made at rates not exceeding the highest rate paid for the same land in any one year within the period of three years next preceding the period at which the leases were cancelled. In the case of dependent talukdars, if the rent were computed according to the rates payable by raiyats or cultivators, a deduction was to be allowed from the gross rent at the rate of ten per cent. for talukdar's profit, over and above a reasonable allowance for collection charges.

The right of an auction-purchaser under Regulation XLIV of 1793, s. 5, is limited to raising the rent of a taluk created by the defaulter to what is demandable from it according to the pergunnah rates prevailing, either at the time when the taluk is created, or at the time when the auction-purchase takes place; and he cannot demand any higher rent even if, at any subsequent time, such higher rent be in accordance with the prevailing current rate—(Mohini Mohan *v.* Icha Moyé, I. L. R., 4 Cal., 612.) In every part of India the Government or its alienee is debarred, if not by law (as in Bengal) yet by custom of the country, from enhancing the assessment of permanent tenants beyond a certain limit. What that limit is must be determined

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by the circumstances of each case. In a suit by an *enamdar*, holding under a grant from Scindia made in 1793, against his permanent tenant for an enhanced rent, the Court, in the absense of law or contract to the contrary, affirmed the plaintiff's right to enhance the assessment to the extent to which, according to the old custom of the country, Scindia would have been entitled to enhance it, and upon a virtual admission of the defendant allowed enhancement to the extent of one-half the produce—(I. L. R., 3 Bom., 348.)

Payable by persons holding similar tenures:—Under clause (7) of section 3 of the Act, the word "tenure" includes an under-tenure. Can then the rent of a tenure-holder be forced up to that of an under-tenure-holder? The word 'similar' has saved that risk. 'Similar' should therefore mean not only similar in quality, but similar in degree or class. It would include similarity of land, because tenures not having similar lands can hardly be described as similar to each other. The word is used in its widest sense. The rates payable by talukdars and those payable by cultivating raiyats are different, and the former cannot be enhanced so as to be equal to the latter. The Talukdar is entitled to some reasonable profit—(Haro Sundari *v.* Anand Mohan, 7 W. R., 459; Mohim Chunder *v.* Gurudas, 7 W. R., 285; Muneekurnika *v.* Anund Moyee, 10 W. R., 245; Dyaram *v.* Bhobindur, 1 Sel. Rep., 139; Gopee Mohan *v.* Radha Mohan, 2 Sel. Rep., 17; Jadub Chunder *v.* Johori Lushkur, W. R. (1864), Act X, 74; Mohim Chunder *v.* Guroo Dass, 7 W. R., 285; Shoora Sundari *v.* Gopal Lal, 19 W. R., 143; Babu Dhunaput *v.* Goomun, 11 Moo. I. A., 433 at p. 468; 9 W. R., P. C., 3; Khajeh Asanullah *v.* Obhoy Chunder, 13 Moo. I. A., 317 at p. 324.) In a recent case (Bissesvari *v.* Hem Chunder, I. L. R., 14 Cal. 133) it has been held that the rate of rent to be fixed as payable by the tenure-holder must ordinarily be fixed with reference to the rents paid by raiyats within the tenure itself, and not with reference to those paid by raiyats in the neighbourhood outside the limits of the tenure. There is nothing to prevent the rent of a dependent taluk being enhanced. Similarly it has been held that a howladar cannot enhance his nim-howladar to the same extent as his own rent has been enhanced, but only up to the ordinary rate for similar land—(Mirtenjai *v.* Manik Chunder, 7 Sel. Rep., 430.)

Sub-section (2).—See notes under s. 7 (1)—"similar tenure." An *enamdar's* power to enhance the rent of a meerasie tenant is limited. He cannot demand more rent than what is fair and equitable according to the custom of the country.—(I. L. R., 3 Bom., 141.) In a suit for enhancement of the rent paid by *shikmi* talukdars, the plaintiff is bound to afford data (*e.g.*, the rate paid by intermediate tenants of the same class) upon which the Court can come to a satisfactory conclusion as to what would be a fair and equitable rate to be paid by defendant; plaintiff being competent under s. 10, Act VI of 1862, to measure the taluk and ascertain the assets.—Debi Dass *v.* Gobind Mohan, 10 W. R., 213.) When the under-tenants paid 1 rupee 4 annas to the howladar, he paid 14 annas to the landlord; when they paid him 1 rupee 8 annas, it was only fair that he should pay 1 rupee to the landlord.—(Bharat Chunder *v.* Gour Moni, 11 W. R., 31.) As to what is to be considered fair and equitable rate, this sub-section should be read subject to sub-sections 3 and 4.

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Sub-section (3).—Profit not less than ten per centum.—The Rent Commissioners observe that there are in the existing law no express provisions for the enhancement of the rents of tenures, and that the want of a definite enactment on the point has given rise to much expensive litigation. The sections of the Bill relating to this matter are based on those drafted by the Commissioners, and the grounds on which they rest will be best seen from the following extract from the Commissioners' report :—

The Rent Commission.

"We have," they say, "provided for the enhancement of the rent of tenures and under-tenures, by enacting that, in any case in which such rent is liable to enhancement,—there are cases in which it is not so liable,—it may be enhanced up to the limit of the customary rate payable by persons holding similar tenures or under-tenures in the vicinity, or, where no such customary rate exists, up to such limit as to the Court shall appear fair and equitable, but so that the profit of the tenure-holder or under-tenure-holder shall not (in the absence of certain special circumstances, to be noticed hereafter) exceed thirty per centum of the balance which remains after deducting, from the gross rents payable to him, the expenses of collecting such rents. It may be observed that, according to the rule contained in s. 8 of Reg. V of 1812, ten per rent. of the balance just mentioned was allowed to the tenure-holder. This section was repealed by Act X of 1859, but, by some oversight, no provision was substituted by this Act though the principle, as being fair and equitable in itself, and usual by reason of the provisions of the regulation, was, on several occasions, acted upon by the Courts after that Act was passed. It appears to a majority of us, after careful consideration, that the limit of ten per cent. is too low, and we have accordingly allowed a higher limit, namely that of a maximum not exceeding thirty per cent. in ordinary cases. We have provided for the special and well-known case of *jungleboori* holdings by enacting that, when more than one hundred bighas of land have been demised for reclamation purposes, more than half being at the time unreclaimed, and the whole having been subsequently reclaimed, the rent of the tenant may not be enhanced so as to leave him a profit of less than twenty per cent. of the net balance above-mentioned, and the Court may allow him such profit in excess of twenty per cent. as to it appears fair and equitable. In order to prevent these new provisions from working hardship by any sudden and great change, we have annexed the following check : (*a*) the enhanced rent shall not in any case be more than double the previous rent; (*b*) the Court may direct that the enhancement shall take effect gradually,—or, in other words, that the rent shall increase yearly during any number of years not exceeding five, until the limit of the enhancement allowed has been reached; and (*c*) that rent once enhanced shall not be altered for ten years unless on account of alluvion or diluvion."

Bill No. I.

"The only further points calling for notice in connection with these sections are, that it has been provided that the tenure-holder's profits shall never be less than ten per cent. of the net balance, that the provision regarding jungleboori tenures has been made applicable to all such tenures irrespective of the area comprised in them, and that a clause

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has been added providing that when a tenure-holder has made improvements other than those referred to by the Commissioners, the Court may allow him such amount, by way of profit, as it thinks fit, provided it be not less than ten per cent." (Select Committee on B. T. Bill No. I.)

Bill No. II.

"We have made a considerable alteration in s. 7, sub-section (3), which lays down the rules to be followed by the Court in enhancing the rent of a tenure in cases where the matter is not provided for by contract or custom. It is now simply enacted that the Court shall not leave the tenure-holder less than ten per cent. of the profits, and in fixing the rent shall have regard to the circumstances under which the tenure was created, to the improvements made by the holder of it, and to the costs and risks of collection." (Select Committee on B. T. Bill No. II.)

Bill No. III.

"We have in s. 7 of this chapter included, among the matters to which a Court must have regard in enhancing the rent of a tenure-holder, the questions—whether the tenure was originally granted at a specially low rent for the purpose of reclamation, and whether any fine or premium was paid on the creation of the tenure. (Select Committee on B. T. Bill No. III.)

The old law.

The margin of profit according to the decisions should be from one-third to one-sixth of the gross rent.—(Jadub Chunder *v.* Ishan Lushkar, Sp. W. R., Act X, 74; 2 R. J. P. J., 313.) An intermediate holder's rent should not be enhanced, so as to render his holding altogether void of all reasonable profit. To charge him with full rents of cultivating and resident raiyats would not be fair and equitable.—(Gouree Prosad *v.* Rani Surnamoyi, 6 W. R. (Act X), 41; Uma Churan *v.* Umatara, 8 W. R., 181; Muneekarnika *v.* Anand Moyi, 10 W. R., 245.) The profit of the talukdar should be fifteen per cent. according to Rani Surnamoyi *v.* Gouri Prosad, 3 B. L. R. A. C., 270; and ten per cent. and charges according to Punchanand *v.* Hur Gopal, 1 Sel. R., 145.

The Noabad *talukdars* of Chittagong used to pay a customary rate of Rs. 16 a droon (=6·35 acres), but in the recent settlement of that district their rents were enhanced according to the rules laid down in sub-sctions (3) and (4) of section 7, by which the fair rents payable by tenures liable to enhancement have, in fact, been determined in all settlements of rent under Chapter X of this Act since it came into force. The 10 *per cent* rule was taken from section 8 of Regulation V of 1812.

In practice it has been found necessary, in most of the recent settlements of rents under Chapter X, to allow tenure-holders more than 10 *per cent* after deducting from the gross rents payable to them the expenses of collection. In Chittagong, 30 *per cent* on the gross rents, inclusive of cost of collection, was ordinarily allowed, and where an under-tenure holder intervened between the cultivator and the tenure-holder a larger percentage was given. The Settlement Officer of Chittagong explains the procedure adopted in settling the rents of *talukdars* (tenure-holders of the first degree) in that district thus—

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A, a *talukdar*, has leased his entire *taluk* to B in *itmam*. B has sublet all his lands to C, D, E, and F, settled cultivators. The Revenue Officer finds that the fair rent of each of C, D, E, and F is Rs. 25. The gross rents of the *itmam* are, therefore, Rs. 100. Supposing the Revenue Officer to find that 15 *per cent* is a fair profit to allow to the *itmamdar*, the fair rent payable by B to A would be Rs. 100, less 15 *per cent.*, or Rs.. 85. The rent payable by A to Government would not be Rs. 85 less 30 *per cent* of Rs 85; but (as the assets of the *taluk* for purposes of assessment are not lessened by any portion which the *talukdar's* grant enables the *itmamdar* to intercept) the assets of the *taluk* would be Rs. 100, and the fair rent Rs 70. B pays Rs. 85 to A, while A pays Rs. 70 to Government. A's actual profit, therefore, is only Rs. 15, or 17·6 *per cent.*

To prevent hardship, Government is (*i.e.*, where it is proprietor) willing to concede a larger percentage than 30 *per cent.* for distribution between tenure-holders and under-tenure-holders in cases where the Revenue Officer, in careful exercise of the discretion given to him, thinks proper to distribute a larger percentage.—(Chittagong Settlement Rep. App. VI, p. lx, para 13.)

Cl. (*a*) of sub-section 3 clearly indicates that a tenure-holder within the contemplation of the Act must be a person who holds land which is used or fagricultural or horticultural purposes. *Per* Banerjee J., Umrao Bibi *v.* Syed Mahomed, 4 C. W. N. 76; 27 Cal. 205.

Onus probandi.—In a suit for enhancement of the rent of a tenure under section 7, it is for the plaintiff to start his case by proving that the existing rate was below the customary rate payable by persons holding similar tenures in the vicinity, or that it was not fair and equitable, before the *onus* could be shifted to the defendant to prove that the existing rent was fair and equitable.—Hem Chunder *v.* Kali Prosunno, I. L. R., 26 Cal. 832.

Power to order gradual enhancement.

8. The Court may, if it thinks that an immediate increase of rent would produce hardship, direct that the enhancement shall be gradual; that is to say, that the rent shall increase yearly by degrees, for any number of years not exceeding five, until the limit of the enhancement allowed has been reached.

Compare with Section 36 post.

Rent once enhanced may not be altered for fifteen years.

9. When the rent of a tenure-holder has been enhanced by the Court or by contract, it shall not be again enhanced by the Court during the fifteen years next following the date on which it has been so enhanced.

Compare with section 37 post.

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Other incidents of tenures.

It is curious that notwithstanding this heading, section 10 to 17 give only incidents of permanent tenures and not of all tenures. The Chapter purports to give incidents of tenure-holders, whether permanent or not, and sections 6 to 9 give conditions of all sorts of tenures.

10. A holder of a permanent tenure shall not be ejected by his landlord except on the ground that he has broken a condition on breach of which he is, under the terms of a contract between him and his landlord, liable to be ejected :

Permanent tenure-holder not liable to ejectment.

Provided that where the contract is made after the commencement of this Act, the condition is consistent with the provisions of this Act.

This section should be read with sections 65, 89, 155, and 178 (1) *c* of the Act.

Permanent tenure :—See notes under s. 3 (8) ante.

Ejectment of a permanent tenure-holder.—Observe the definition of 'permanent tenure' (section 3 (8).) Ordinarily ejectment of the holder of such a tenure is inconsistent with the definition ; hence the only possible case is a breach of the condition of the tenure. But the condition must be consistent with the provisions of this Act, where the contract is made after its commencement. If the forfeiture be a penalty for non-payment of rent, it would not operate as a breach of condition (section 65). Then again in no case will the tenure-holder be ejected from his tenure except in execution of a decree (sections 89, 178 (1) *c*), *i. e.*, except by a suit, and a suit for ejectment is not possible except under the conditions stated by section 155. A notice to quit which directs the tenant to vacate a certain quantity of land under his landlord is not bad in law merely because it includes some land which the tenant is found not to hold under the landlord.—Shama Churn *v.* Uma Churn, 2 C. W. N. 106. See notes under s. 155.

Breach of Condition.—This was also the previous law. The liability to ejectment of the holder of a *mokurari istemrari* ijara is to be determined by the conditions of his lease, and not by the provisions of section 21, Act X of 1859—(Mohunt Bularam *v.* Jogendronath, 19 W. R., 349.) The Court (Mitter, J.) observed : "The defendant is the holder of a *mokurari istemrari* ijara and not a raiyat. It is therefore clear that his liability to be ejected from his tenure is to be determined by the conditions of his lease, and not by the provisions above referred to. Now the right of re-entry reserved by the potta, by which the defendant's tenure was created, can, under the express terms of that document, be exercised only when there is an arrear of rent due at the end of the year, the words being used *Saltamamee Akhiree.* It appears,

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however, that the present suit for ejectment was brought in the month of Asar, that is to say more than two months previous to the expiration of the Velaity year, and the arrears claimed are admitted to be arrears due for three previous months, *viz.*, Jyte, Bysak and Chyte. Under such circumstances, it is clear that the arrears cannot be treated as arrears remaining due at the end of the year, and that the plaintiff's claim for ejectment, so far as it is based upon the non-payment thereof, must necessarily fall to the ground." The same principle was held applicable to talukdars. Act VIII (B. C.) of 1869 does not apply to the case of a talukdar who has power to transfer his land, and is liable, under the terms of his kabuliyat, to immediate ejectment in the event of default. The question whether a talukdar is liable to ejectment must be determined by the provisions of his lease—(Mumtaz Bibi *v.* Grish Chunder, 2 W. R., 376.) But see the rulings quoted under the heading "Consistent with the provisions of the Act." In the case of a service tenure a distinct refusal to perform services will cause its forfeiture—(Hurprasada *v.* Ramruttun, I. L. R., 4 Cal. 67). But every breach of the conditions of a lease will not subject the tenure-holder to ejectment, the condition must be such as its breach will work by contract as a forfeiture—(Alum Shah *v.* Moran, W. R. Sp. Act X, 31; Guru Prasad *v.* Phillippe, 2 Hay, 451: Mohomed Faez Khan *v.* Shib Doolari, 16 W. R., 103).

Consistent with the provisions of this Act.—The condition must be consistent with the provisions of this Act. Hence if non-payment of rent be a condition of forfeiture, and the condition is made after the commencement of this Act, it will not operate (section 65). But if this condition had been contracted before the Act came into force, will it operate? The answer to this will be found by reading section 178 (1) *c* with section 65. Under section 178 (1) *c*, no contract made between a landlord and a tenant before or after the passing of this Act shall entitle a landlord to eject a tenant otherwise than in accordance with the provisions of this Act, and under section 65, where a tenant is a permanent tenure-holder, he shall not be liable to ejectment for arrears of rent. It follows that a condition stipulating forfeiture of a permanent tenure for non-payment of rent will never operate, whether the contract is made before or after the passing of this Act. Under the old law where such conditions existed, the Courts allowed time for remedying the breach. In a suit for the cancelment of a lease on account of a breach of its conditions, the breach complained of consisting in the non-payment of rent for a particular period specified in the lease, the lessee is entitled to avail himself of the provision in section 78, Act X of 1859, that section applying to all suits for the ejectment of a raiyat or for cancelment of a lease for non-payment of rent—(Jan Ali *v.* Nityanund, 10 W. R., F. B., 12.) So as to section 52, Act VIII of 1868 (B. C.) which corresponds to section 78, Act X; Shaik Abdoor Rahaman *v.* Digumbari Dasi, 18 W. R., 477.) But applicable only to raiyats and not to talukdars—(Mumtaz Bibi *v.* Grish Chunder, 22 W. R., 376.) Where in a perpetual lease there was a condition that, on default being made in payment of a certain number of instalments of rent, the lease should be void, it was held that in a suit under clause 5, section 23 of Act X of 1859, for cancellation of the lease on accouut of a breach of the condition, the lessee was entitled to the benefit of section

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78, even though the defence set up was false in fact—(Duli Chand *v.* Meher Chand, 12 B. L. R., P. C., 439.) A seputni was granted to B by A who held a dur-putni containing the following conditions, viz., "I shall pay rent month by month; should I fail in that I shall pay interest on instalments overdue at 1 per cent. per month. I shall pay the rent in full by the close of every year. Should I neglect to make the payments, you will, of your own authority, take over possession of the said dur-putni taluk after the expiration of one month of the next succeeding year, and I shall have no complaint against your doing so." Upon non-payment of rent for the year 1281, a suit for khas possession of the lands was brought against A and B. The defendants claimed an equitable right to prevent forfeiture by paying all arrears according to the terms of the dur-putni, together with all costs. The Court (Pontifex and McDonell, JJ.) observed: "We do not think it necessary to decide in this case whether or not the provisions of the Rent Laws actually apply; because we think that, even if they do not in terms apply, we are bound by analogy to that law to apply in favour of the defendants,—an equity similar to the equity there given. We therefore think that if the defendants pay the whole of the rent due up to the present time, with interest according to the stipulations of the original kabuliyat and potta, and also pay all the costs of the proceedings in both this Court and of the Courts bellow, the plaintiff ought not to have khas possession decreed to him"—(Mothoora Mohan *v.* Ramlal, 4 C. L. R., 469.) Where in a mokurari lease, there was a condition that in case of non-payment of one year's rent, and its falling into arrears, the mokurari settlement was to be cancelled, and default was made and a suit for ejectment was brought, it was held that independently of the Rent Act, the defendant should be allowed in equity a reasonable time to pay the landlord's dues in order to prevent forfeiture. It was also held that the provisions of section 52 of Bengal Act, VIII of 1869 are exactly similar to those of section 78 of Act X of 1859, and applicable to the case of a mokurari lease; and therefore that a decree passed in conformity therewith, which allowed fifteen days for the payment of the arrears of rent found due and interest thereon was a good decree. Under the present law a permanent tenure holder is liable to ejectment for arrears of rent (sections 65 and 66). The decision of Mumtaz Bibi *v.* Grish Chunder, 22 W. R., 376, was dissented from under the authority of Duli Chand *v.* Meher Chand, 12 B. L. R., 439.—(Mahomed Ameer *v.* Peryag Sing I. L. R., 7 Cal., 566).

In all such cases now section 155 should be applied on principles of equity.

Building tenures.—See section 184 and notes.

Ejectment of a tenure-holder not permanent,—Sections 89, 155 and 178 (1) *c* will govern his case. Breach of condition of tenure will under the ordinary law of contract subject him to ejectment, if forfeiture has been stipulated as its penalty.

Limitation—Limitation does not begin to run in favour of a mokuraridar against the zemindar, until the latter has had notice that the former claims under a mokurari grant—2 P. C. R., 806; 19 W. R., 252, cited above. Under article 1 of Part I of Schedule of this Act, a suit to eject any tenure-holder on account of a breach of condition resulting a forfeiture must be brought within one year of the date of the breach; and notice under section 155 must be served long before.

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Onus of proof.—When a tenant has admitted that he is a tenant, the onus is upon him to show that his tenancy is such as he sets up, namely, a permanent tenancy at a rate which cannot be enhanced (Khetra Krishna Mitra *v.* Divendra Narain Rai, 3 C. W. N., 202). In a suit by a landlord for khas possession, the defendants set up and proved an intermediate tenure, *held* that it was on the plaintiffs to show that the parcel of land sought to be resumed was outside such tenure—Rajendra *v.* Mohim 3 C. W. N., 763; but see Nandalal *v.* Jogeswar, 3 C. W. N. cccliii. In a suit for ejectment by a purchaser at a revenue sale, the defendants claimed to hold the land as a subordinate *taluk*, which had been in existence and in the possession of themselves and their predecessors since the time of the permanent settlement. It was found as a fact that the tenure was in existence in 1789-99. *Held*, that, although in the first instance the burden of proof was on the defendants, yet it had been discharged by the proof of the defendants' long possession and of the fact that the *taluk* was in existence one hundred years ago (Nityanand Rai *v.* Banshi Chandra Bhuiyan, 3 C. W. N., 341). When a defendant alleges that he holds a permanent tenure, the burden of proving that fact lies on him, and it is not for the plaintiff to show that he is not a tenure-holder but only a raiyat (Nilmoni Maitra *v.* Mathura Nath Joardar, 4 C. W. N., clix). If a person sets up as against Government a permanent talukdari right, it is incumbent on him to make out that case. Prosunno *v.* Secretary of state, I. L. R., 26 Cal. 792: 3 C. W. N. 695.

11. Every permanent tenure shall, subject to the provisions of this Act, be capable of being transferred and bequeathed in the same manner and to the same extent as other immovable property.

Transfer and transmission of permanent tenure.

Subject to the provisions of this Act.—See sections 12 to 17, 88, 181 and 183 which limit this provision.

Incidents of a permanent tenure.—Heritability of a permanent tenure goes with its definitions;—(see section 3 (8) and notes; Watson *v.* Juggessur, Musst, 330: Muret Lukhee Koer *v.* Rai Hari Krishna, 3 B. L. R. 226; 12 W. R., 3; Karunakur *v.* Niladhro, 5 B. L, R., 652; 14 W. R., 107.) This section makes it also transferable and passable by a will. The word 'transfer' has not been defined in this Act. In the Transfer of Property Act (Act IV of 1882), "transfer of property" means an act by which a living person conveys property, in present or in future to one or more other living persons, or to himself and one or more other living persons, and to "transfer property" is to perform such act (s. 5). So under the old law permanent tenures were transferable.—(Sadananda *v.* Nurrottum, 3 B. L. R., 280; 16 W. R., 290; Brajanath *v.* Lukhinarain, 7 B. L. R., 211; Panye Chunder *v.* Hem Chunder, I. L. R., 10 Cal., 496; Ananda Rai *v.* Kali Prosad, I. L. R., 10 Cal., 677.) A permanent tenure-holder can sub-let, see s. 179, *post*.

Heritable.

Transmissible.

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Section 11 is not in force in Orissa and as s. 183 saves customs, tenures which before the passing of the Act were by custom non-transferable, as, for instance, *surbarakari* tenures in Orissa, which, though hereditary, are not transferable without the consent of the *semindar*, will continue to be so—(see Durjodhan Das *v.* Chuya Dai, 1 W. R., 322; Kashi Nath Pani *v.* Lakhmani Prasad Patnaik, 19 W. R., 99; Dashorathi Hari Chandra Mahapatra *v.* Rama Krishna Jana, I. L. R., 9 Cal., 526; Bhuban Pari *v.* Shama Nand De, I. L. R., 11 Cal., 699; and *contra*, Sudanando Mahanti *v.* Nauratan Mahanti, 8 B. L. R., 280; 16 W.R., 290).

Transfer of shares.

Sections 17 and 18 of the Bengal Tenancy Act recognise the transfer of a share of a tenure and entitle the transferee to be regarded as one of the tenants in respect of the holding:—Mohesh Chunder *v.* Saroda Prasad, I. L. R., 21 Cal. 433. An alienation of the interest in any portion of the *putni taluk*, such portion not being an aliquot part of share, but being a portion of the land composing the *putni* can be made:—Madhab Ram *v.* Doyal Chand, I. L. R., 25 Cal. 445. See notes under s. 17.

Sale invalid unless in strict conformity to the Act.

The law has effected considerable changes in the law relating to the sale of permanent tenures, dispensing as it does with the recognition of the sale by the landlord, as a condition to its validity; and the more unfettered freedom of transfer confirmed by the Act was intended to be exercised, if at all, in strict conformity to the conditions which the Act prescribes, and unless those conditions are substantially complied with, the transfer is invalid and ineffectual:—Babar Ali *v.* Krishna Kamini 3 C. W. N. 531; I. L. R., 26 Cal. 603.

General restriction on assignment.

A general restriction on assignment does not apply to an assignment by operation of law taking effect *in invitum*, as a sale under execution:—Golak Nath *v.* Mothura Nath, I. L. R., 20 Cal. 273, see also Diwali *v.* Apaji, 10 Bom. 342.

Compulsory sale.

Where a lease contained a clause stipulating that the tenant would not let the lands to be attached and sold in satisfaction of judgment debts, and that if he did, that would give the landlord a right of re-entry, *held* that if the lessee allowed the land to be attached and sold by not taking measures to satisfy his judgment debt, there would be breach, both according to the letter and spirit of the proviso in the lease:—Vyankatraya *v.* Shivrambhat. I. L. R., 7 Bom. 256.

Onus of proof of transferability.—As regards tenures which are not permanent, there is a ruling in the case of Daya Chand Saha *v.* Anand Chandra Sen (I. L. R., 14 Cal. 382), in which it has been said that there is no presumption that any tenure held is not a transferable tenure, and a landlord who sues for *khas* possession on the ground that a tenure sold was not transferable must establish his case as an ordinary plaintiff. The subject matter of this suit appears, however, not to have been a "tenure" in the strict sense of the term, but a "holding," and the rule laid down in this case was subsequently dissented from in respect to a raiyat's holding in the case of Kripamayi Debi *v.* Durga Gobinda Sarkar (I. L. R. 15 Cal., 89). See note to sec. 26.

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For building tenures, see s 182 and notes.

Escheat.—Lands belonging to a zemindari granted by the zemindar under an absolute hereditary *mokurari* tenure do not, on the death of the grantee without heirs, revert to the zemindar ; nor does the zeminder, under such circumstances, take by escheat a tenure subordinate to and carved out of his zemindari. The Crown will, on the failure of heirs by the general prerogative, take the property by escheat, subject to any limits or charges affecting it ; and there is nothing in the nature of a *mokurari* tenure which should prevent the Crown from so taking it.—(Sanat Kumar *v.* Hemmut Bahadur, I. L. R. 1 Cal., 391, P. C.)

Surrender and Relinquishment :—There is no provision for surrender and relinquishment of a tenure, though there is one of a holding (see s. 86). A voluntary abandonment of a permanent and transferable tenure for a long period without any inevitable force major or other cause beyond the power of the holder is tantamount to express relinquishment, and neither the holder nor any one under him can reclaim it,—Chandramani *v.* Sambhu Chander, W. R. S., p. 1864, 270. A putnidar, however, cannot of his own choice throw up his putni and by so doing escape his liability to pay rent. The contract, though not indissoluble can only be dissolved by an act of the Court. and after proper enquiry.—Hira Lal *v.* Nilmuni, 20 W. R. 383. In a recent case it has been held, that a tenure under a mokurari maurasi lease of land, which is not let for agricultural purpose, cannot be put an end to by a mere relinquishment on the part of the lessee, although after notice to the landlord.—(I. L.R., 9 Cal., 671.) Field, J., was of opinion in this case that the principle laid down in Hiralal, *vis.*, that a putnidar cannot of his own opinion relinquish his tenure, is applica ble to all intermediate tenures between the zemindar and cultivator of the soil, except those held on farming leases. A landlord is not bound to accept any reliquishment by the putnidar, and when a zemindar finds that the putnidar or other permanent tenure-holder, after having allowed a trespasser to hold adverse possession of any land included in the permanent tenure for more than 12 years, offers to relinquish it, the zemindar can always refuse to accept the relinquishment ; but if he accepts such relinquishment, it operates only as a transfer and in a suit by the zemindar for recovery of possession against the trespasser, limitation runs when the possession of the latter became adverse to the tenure-holder and not from the date of relinquishment : Gobinda Nath *v.* Suraj Kanta, 26 Cal. 460. The right of relinquishment is a privilege given to tenants, by means of which they may restrict the lease and establish their tenure upon a new basis or may extinguish the lease altogether ; and the tenants cannot avail themselves of that privilege to any extent, unless they strictly observe the conditions which are either expressed or implied in the lease.—Ram Churan *v.* Rnigunge Coal Association, 2 C.W.N. 697 (P. C.) : I.L.R. 26 Cal. 29. There is no law requiring that a surrender should be in writing. Where a dur-mokurari lease has been granted and then relinquished for a valuable consideration to the grantors, no formal reconveyance is necessary to revert the title to the latter—the receipt of the money and the relinquishment of possession sufficiently shewing what had become of the *dur-mokurari* interest :—Imambandi *v.* Kumleswari, 13 I. A. 160 : I.L.R., 14 Cal. 109. It has been decided in the case of Khondkar Abdur Rahaman *v.* Ali

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Hafez, 3 C. W. N. 531, that the surrender by a raiyat need not be in writing.

Voluntary transfer of permanent tenure.

12. (1) A transfer of a permanent tenure by sale, gift or mortgage (other than a transfer by sale in execution of a decree or by summary sale under any law relating to putni or other tenures) can be made only by a registered instrument.

(2) A registering officer shall not register any instrument purporting or operating to transfer by sale, gift or "usufructuary" [Act VII of 1886] mortgage a permanent tenure unless there is paid to him, in addition to any fees payable under the Act for the time being in force for the registration of documents, a process-fee of the prescribed amount and a fee (hereinafter called "the landlord's fee") of the following amount, namely :—

(*a*) When rent is payable in respect of the tenure, a fee of two per centum on the annual rent of the tenure : provided that no such fee shall be less than one rupee or more than one hundred rupees; and

(*b*) When rent is not payable in respect of the tenure, a fee of two rupees.

(3) When the registration of any such instrument is complete, the registering officer shall send to the Collector the landlord's fee and a notice of the transfer and registration in the prescribed form, and the Collector shall cause the fee to be paid to, and the notice to be served on, the landlord in the prescribed manner.

Voluntary transfers.—Instrument "means a non-testamentary instrument" (s. 3, Act IV of 1882).

Transfer of a permanent tenure.—The transfer of the permanent tenure under s. 12 of the Bengal Tenancy Act is complete as soon as the document is registered.—(Krishto Ballav *v.* Krisbto Lal, I. L. R., 16 Cal. 642.) If a recorded tenant has transferred his tenure to another person, and that transfer has been duly registered under the provisions of the Bengal Tenancy Act, he is no longer liable for the rent of the tenure, although the landlord may not have received actual notice of such transfer.—(Kristo Ballav *v.* Kristo Lal I. L. R., 16 Cal., 642, relied on : Chinta Moni Dutt *v.* Rash Behari Mondul, I. L. R., 19 Cal.. 17.) A transfer of a tenure made in terms of the provision of the Bengal Tenancy Act of 1885 is not binding on the landlord if there be a contract between the landlord and the tenant that the

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transfer shall not be valid and binding until security to the satisfaction of the landlord has been furnished, by the transfer, and such security has not been furnished. The tenant is still liable for the rent.—(Dinobondhu Roy *v.* Bonerjee, I. L. R., 19 Cal., 774.) This Act is not applicable to transfer of putni tenure,—Gyanoda *v.* Brahmomoy, I. L. R., 17 Cal. 162; Surendra Nath *v.* Tincourie, I. L. R., 20 Cal. 247, but applies to the transfer of dur-putni teuures: I.L.R., Mahomed *v.* Brajosundari, I.L.R., 18 Cal. 360. The provisions of s. 59 of the Transfer of Property Act must be held to be subject to this section and therefore a mortgage of a permanent tenure not exceeding Rs. 100 in value can only be effected by a registered instrument.—Soshi Bhuson *v.* Sahadeb, 2 C. W. N. 499. It seems that the provisions of s. 54 of the Transfer of Property Act and s. 17 of the Indian Registration Act are also subject to this section.

Registering officer:—For rules of the Registration Department for the registration of documents under this section, as revised by Government notification, see Appendix.

Transfer when complete:—The transfer is complete as soon as the document is registered,—Kristo Ballav *v.* Kristo Lal, I.L.R., 16 Cal. 642, and a transferrer is not liable for rent after such transfer although the landlord has not obtained notice of such transfer,—Chinta Moni *v.* Rash Behary, I. L. R., 19 Cal. 17; but the transfer is not binding when security is not furnished in accordance with agreement to that effect.—Dinobandhu *v.* Bonerjee, I. L. R., 16 Cal. 774. Though no title passes except upon registration of the conveyance, yet mere registration may not be sufficient to pass a good title; if the parties intend that no title shall pass upon registration till the consideration-money has been paid and the deed delivered, the law will give effect to such intention. Registration is *primâ facie* proof of intention to transfer the title and the party who alleges the existence of a collateral agreement must strictly prove it:—Sheo Narain Singh *v.* Darbari Mahton, 2 C. W. N. 207.

Landlord's fee.—The 'tender' system of payment of landlords' fees having been discontinued by the Board's circular order, No. 6 of September, 1896, such fees are now held in deposit in the Collector's office till applied for by the landlord or by some other person duly authorized on his behalf to receive them...No separate process-fee should be charged when a landlord applies that the fees due to him may be remitted to him through a peon. (Board of Revenues' circular order, No. 7 of December, 1897).

Effect of non-payment of Landlord's fee:—See Act I B. C. of 1903 Appendix.

Collector:—By a notification, dated the 7th October, 1886, published in the *Calcutta Gazette* of the 13th idem, Part I, p. 1092, all officers in charge of subdivisions were vested with powers of a Collector for the purpose of discharging the functions referred to in secs. 12, 13, and 15 of the Act.

Mode of service of notice—See rule 1, Chap. V of the Government Rules under the Tenancy Act, Appendix.

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Scale of fees for service of notice :—See rule 1, Chap. V of the Government Rules under the Tenancy Act, Appendix.

Transfer of permanent tenure by sale in execution of decree other than decree for rent.

13. (1) When a permanent tenure is sold in execution of a decree other than a decree for arrears of rent due in respect thereof, "or when mortgage of a permanent tenure, other than an usufructuary mortgage thereof is foreclosed" [Act VIII of 1886], the Court shall, before confirming the sale under s. 312 of the Code of Civil Procedure, "or making a decree or order absolute for the foreclosure" [Act VIII of 1886], require the purchaser "or mortgagee" [Act VIII of 1886] to pay into Court the landlord's fee prescribed by the last foregoing section and such further fee for service of notice of the sale "or final foreclosure" [Act VIII of 1886], on the landlord as may be prescribed.

(2) When the sale has been confirmed, "or the decree or order absolute for the foreclosure has been made" [Act VIII of 1886], the Court shall send to the Collector the landlord's fee and a notice of the sale "or final foreclosure" [Act VIII of 1886], in the prescribed form, and the Collector shall cause the fee to be paid to, and the notice to be served on, the landlord in the prescribed manner.

Effect of non-payment of landlord's fee :—Before Act I of B. C. of 1903 was passed, the payment of landlord's fee was thought to be a condition precedent to the validity of the sale.—Babar Ali *v.* Krishna Manini, I. L. R. 26 Cal. 603. But this has been altered by section 1 of Bengal Act I of 1903 which declares that the non-payment of the landlord's fee shall not invalidate a transfer. The compulsory recovery of such fee is provided for by section 2 of the said Act. By section 12 a Registering Officer was prohibited from registering a deed of voluntary transfer of a permanent tenure unless the landlord's fee was paid, and a voluntary transfer could only be made by a registered instrument. But under section 13 a sale of a permanent tenure in execution of a decree other than a decree for arrears of rent due in respect of the tenure was invalid unless the landlord's fee had been paid before confirmation of the sale. Now, however, by sections 1 and 2, Bengal Act I of 1903 the payment of the landlord's fee is placed on the same footing in the case of both section 12 and section 13.

Transfer of putni and dar-putni taluks :—*Putni taluks* are not governed by the provisions of this section, being specially saved from its operation by section 195 clause (e), of this Act. A *semindar* or other superior of a *putni taluk* is therefore entitled to refuse to recognize the transfer of a *putni taluk* until the rules laid down in ss. 5 and 6 of Reg. VIII of 1819 have been complied with.—(Gyanada *v.* Bramomoyi I. L. R., 17

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Cal., 162). The *putni* right over a specific area lying within a *putni taluk* is transferable.—Madhab Ram *v.* Dayal Chand Ghosh, I. L. R., 25 Cal., 445 ; 2 C. W. N. 108.

But the provisions of both sections 12 and 13 have been held by a Full Bench of the High Court to apply to *dar-putnis*, since section 195 (*e*) does not exclude *dar-putnis* from the operations of this Act :—Mahomed Abbas *v.* Broja Sundari I. L, R. 18 Cal. 300. A *dar-putnidar*, therefore, cannot sue for the registration of his name in the landlord's *sherista* under sections 5 and 6 of Regulation VIII of 1819:—Moti Lal *v.* Omar Ali 3 C. W. N. 19.

Registration in Landlord's office :—In a case under Act X of 1859 it was held that a purchaser of a transferable tenure who had not registered his name in the landlord's *sherista* had no right to maintain a suit to have it declared that a sale of the tenure at the instance of the landlord against the recorded tenant was null and void and that he had no *locus standi* against the auction-purchaser and had no right to impugn the title of the auction-purchaser uuder the sale :—Patit Shahu *v* Hari Mahanti, I. L. R., 27 Cal, 789 : see also Sham Chand *v.* Braja Nath 21 W. R. 94 : 12 B. L. R. 484. Where the plaintiffs sued to recover possession of their share of certain rent-paying lands on the allegation that they were entitled to a one-third share of lands by inheritance from the last recorded tenant, and another one-third share by purchase from one of his heirs ; that the defendants Nos. 2 and 3 were entitled to the remaining one-third share ; that for some years they and the said defendants had been paying rent to the landlord and obtaining separate rent-receipts ; that the defendants Nos. 2 and 3, in collusion with the landlord, allowed a decree to be passed against them in respect of the entire *jama*, in execution of which the said lands were sold and were purchased by defendant No. 1. The defence of defendant No. 1, *inter alia*, was that, as the rent-suit brought by the landlord was against the person who was the *sarbarakar* or manager of the *jama*, therefore by the sale in execution of the decree obtained in that suit the entire *jama* passed. It was *held* that, as the landlord was bound to recognise the plaintiffs as tenants in the place of the last recorded tenant, and also as he chose to accept rent from the plaintiffs and the defendants Nos. 2 and 3 separately, he had no right to ignore the plaintiffs and proceed only against the defendants ; and that the entire *jama* did not pass by the sale and the plaintiffs' right was not affected thereby.—Anand Kumar *v.* HaryDas, I. L. R. 27 Cal 545.

Tenure sold charged with rent :—A person who purchases a tenure at an execution sale must, in the absence of any thing to denote the contrary, be taken to purchase it, charged with the rent which is due in respect of it at the time of its purchase, and there being no privity between him and the judgmentdebtor, he cannot recover from the latter the money which he is obliged to pay for the rent so due at the time of the purchase ; so where a plaintiff in execution of a mortgage decree purchased the tenure mortgaged, and then paid the money due under a decree obtained by the landlord against the tenure-holder for arrears of rent for the period anterior to the confirmation of sale, *held* that the plaintiff was not entitled to recover the money paid

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by him for satisfying the rent decree.—Maharanee *v.* Harendra Lal, 1 C. W. N. 498.

Court fees on application for refund of landlord's fees:—Applications or claims for the refund of landlords' fees are liable to court-fee, under both clauses (*a*) and (*b*) of Article I of Schedule II to the Court-fees Act, 1870, of one anna when the amount claimed is less than Rs 50, and of eight annas in other cases. When, however, the amount claimed does not exceed Rs. 25, and the application is made within three months of the date of the deposit, then, under Government of India's Notification No. 849, dated the 16th February 1883 (published on page 122 of Part I of the *Gazette of India* of the 17th *idem*), no Court-fee is required.

14. When a permanent tenure is transferred by sale in execution of a decree for arrears of rent due in respect thereof, the Court shall send to the Collector a notice of the sale in the prescribed form.

The notice to the Collector was obviously provided in view of the Permanent Tenure Registration Bill which has been subsequently dropped.

For notice in the prescribed form, see Local Government Rules, Chap. VIII, Schedule I; Appendix.

15. When a succession to a permanent tenure takes place, the person succeeding shall give notice of the succession to the Collector in the prescribed form, and shall pay to the Collector the prescribed fee for the service of the notice on the landlord, and the landlord's fee prescribed by section 12, and the Collector shall cause the landlord's fee to be paid to, and the notice to be served on, the landlord in the prescribed manner.

Sections 15 and 16 of the Bengal Tenancy Act are not retrospective.—(Profullah Chunder *v.* Samiruddin, I. L. R., 22 Cal., 337.)

Sections 15 and 16 of the Bengal Tenancy Act of 1885 apply to *putni* tenures.—Durga Prosad *v.* Brindabun, I. L. R., 19 Cal., 504. But see s. 195 (*e*) and Gyanada Kanta *v.* Brohmomayi, I. L. R., 17 Cal., 162. It is the duty of persons succeeding by inheritance to a permanent tenure to notify the succession and it is not the duty of the superior landlord to find out who all the heirs of deceased tenure-holder are. Accordingly, when a person is admittedly one of the heirs and as such in possession and liable for the rent, he cannot defeat a landlord's suit for rent by showing that there are other heirs equally liable, unless possibly he goes further and shows that their names have been notified to the landlord as successors of the original holders or that they have been paying the rent and getting receipts as successors.—Khettro Mohan *v.* Pran Krishna, 3 C. W. N., 371. In a suit brought by *putnidars* on the death of the last owner for arrears of rent which accrued due before his death, the defence of the *dar-putnidar* was that, as the plaintiffs had not complied with the terms of this section, the suit was not maintain-

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able. *Held,* that as the plaintiffs did not claim the rent as the holders of the tenure, but as the representatives of the holder or of their father, the rent became an increment to the estate of the father and therefore the suit was maintainable.—Sheriff *v.* Jogmaya Dasi, I. L. R., 27 Cal., 535.

Notice givers under this section should pay the landlord's fees direct into the Treasury (Bd. Cir., No. 4, June, 1898).

For notice in the prescribed form, see Local Government Rules, Chap. VIII, Schedule I, Appendix.

Bar to recovery of rent pending notice of succession.

16. A person becoming entitled to a permanent tenure by succession shall not be entitled to recover by suit, distraint or other proceeding any rent payable to him as the holder of the tenure, until the Collector has received the notice and fees referred to in the last foregoing section.

See notes under s. 15. This section is a penal one and ought to be strictly construed.—Sheriff *v.* Jogmaya, I. L. R., 27 Cal., 535. But though this section is a bar to the obtaining of a decree, it is no bar to the institution of a suit.—Kalibur *v.* Juffer Patwari, 1 C. W. N. 98: I. L. R., 24 Cal., 241; see also Alimuddin *v.* Heera Lal, 23 Cal. 87 (F. B.). In a case where the plaintiff brought a suit as reversionary heirs to their father's estate after their mother's death, the suit was maintainable so far as it related to the claim during their mother's lifetime, although their mother had not complied with the provision of s. 15 of the Act.—Sheriff *v.* Jogmaya, I. L. R., 27 Cal. 538.

17. Subject to the provision of section 88, the foregoing sections shall apply to the transfer of, or succession to, a share in a permanent tenure.

Transfer of or succession to a share:—Ss. 17 and 18 recognise the transfer of a share of a holding and entitle the transferee to claim to be regarded as one of the tenants in respect of the holding and therefore the transferee is entitled to sue for possession by setting aside a sale in execution of a decree to which he was not a party.—Mohesh Chandra *v.* Sarada Prasad, I.L.R., 21 Cal. 433; and if the transfer is of a part only of the tenure the transferee and the original tenant are jointly liable for the rent.—Sreemutty Jogemaya *v.* Girindra Nath, 4 C. W. N. 590. In respect of a permanent tenure, an heir as well as a transferee, even though of a part, is entitled to compel the landlord to recognise him under ss. 15 and 17.—Ananda Kumar *v.* Hari Das, I. L. R., 27 Cal. 545 (at p. 549).

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CHAPTER IV.

RAIYATS HOLDING AT FIXED RATES.

Incidents of holding at fixed rates.

18. A raiyat holding at a rent, or rate of rent, fixed in perpetuity—

(*a*) shall be subject to the same provisions with respect to the transfer of, and succession to his holding as the holder of a permanent tenure, and

(*b*) shall not be ejected by his landlord except on the ground that he has broken a condition consistent with this Act, and on breach of which he is, under the terms of a contract between him and his landlord, liable to be ejected.

Rate fixed in perpetuity:—By the term "fixed rates of rent" to quote the decision of Peacock, C. J., in the Great Rent Case, "is meant not merely fixed and definite sums payable as rent, but also rates regulated by certain fixed principles." Such, for instance, as a certain proportion of the gross or the net produce of every bigha, or such a sum of money as would give to the raiyat any fixed rate of profit after payment of all the expenses of cultivation. *Id cestum est quod cestum reddi potest* is a maxim of law—(Thakuranee Dasee *v.* Bishesvar Mookerji B. L. R. 1 Sup. Vol., 202; 3 W. R., (Act X), 108.) In a subsequent case it was held by E. Jackson, J., (whose views were confirmed by the third Jndge Trevor, J., to whom the case went up for opinion) that no rate of *bhaoli* rent, varying yearly in amount with the varying amount of the gross produce of the land, though a fixed as to the proportion which is to bear to such produce, is a fixed unchangeable rent of the nature alluded to in the section. Bayley, J., dissented, holding that "a contract to pay half in kind did not involve a varying rate, being as much a fixed contract as if it were to pay half of Rs. 100 or any other sum—(Mahomed Yakub Hossein *v.* Sheik Chowdry Wahed Ali, 4 W. R., (Act X) 23; 1 Ind. Jur., 29.) This decision was followed by the Judges in another case—(Thakoor Prosad *v.* Nowab Syud Mahomed Bakar, 8 W. R., 170.) The decison of Trevor and Jackson, J J., is however disapproved of in Ram Doyal *v.* Baboo Luchmi Narain 6 B.L.R., App., 25; 14 W. R. 385. Mr. L. S. Jackson J., dissented from the above rule and observed: "If this ruling is correct, the Legislature must have intended that raiyats who have held land upon one principle, that is to say, upon one fixed rate of division of the produce of their land with the landlord, from the time of the Permanent Settlement, would be entitled to no protection whatever, but would after these eighty, or ninety years be subject to a suit for enhancement or for commutation of their rent at such money rates as the landlord might be enabled to prove. I cannot believe that the Legislature could have intended any such injustice to raiyats in those parts of the country where

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the *bhaoli* system is prevalent, as it is in many parts of Behar. In these parts of the country, there being no such thing as a rate of rent in money, raiyats holding from the time of the Permanent Settlement would have no protection whatever, unless the Legislature meant to include under the words 'rate of rent' the mode or principle of *bhaoli* payment." The weight of authority seems to be in favour of the view adopted by the Chief Justice and Mr. Justice Bayley. Act XI of 1859, section 37, when speaking of raiyats who cannot be ejected by an auction-purchaser, places in the same category those who have a right of occupancy at a fixed rent and those who hold at rates assessable according to fixed rules. And in another case it was held that an arrangement by which a certain rent in cash is to be paid in lieu of rent in kind, does not show a variation in the rate of rent, but is tantamount to saying that the money rate represents and is equivalent to what was before paid in another way.—(Miturjeet *v.* Toondan, 3 B. L. R., App, 88; 12 W. R., 14.) So Mookerji, J., observed: "The rent in money is a rent fixed on a certain proportion of the value of the actual produce of the land. But in cases where the zemindars could not come to any clear understanding as to the money value of the produce, they allow the rent to be paid by a division of the produce itself. In both cases the man who pays the rent is a raiyat." * * *. I am not also prepared to hold that a raiyat who has since the Permanent Settlement paid a certain fixed proportion of the produce of the land to the zemindar cannot say that his tenure is a holding in perpetuity at a fixed rent.—(Jutto Moar *v.* Musst. Basmati Koer, 15 W. R., 479.) So it has been held in the Allahabad High Court that a rent in kind (*bhaoli*), which, though it varies yearly in amount with the varying amount of fhe yearly produce, is fixed as to the proportion it is to bear to such produce, is a fixed rent within the meaning of Act X of 1859, s. 3 (corresponding with Act XVIII of 1873, s. 5). A tenant, therefore, in a permanently settled district, holding his land at such a rent, is entitled to claim the presumption of law declared in Act X of 1859, s. 4 (corresponding with Act XVIII of 1873, s. 6), if he proves that, for a period of twenty years next before the commencement of the suit to enhance his rent, he has paid the same proportion to the produce of his holding - (F. B.) I. L. R., 1 All., 301.

See also s. 50 this Act, and ss. 3 and 4 of Act VIII of 1869 B. C. The words 'in perpetuity' are very important, because the benefits of this section are not available by a raiyat whose rent has been fixed for a term. The presumption, according to s. 50 will not convert an occupancy raiyat into a raiyat at fixed rate.—Bansi Das *v.* Jugdip, 24 Cal. 152.

There is no provision for creating a fixed raiyat by contract. But a landlord can certainly by agreement fix the rent of his raiyat, as such a measure is conducive to the interests of the peasantry and not inconsistent with the object of the Act. Where the period of the tenure is not fixed but the rent, the intention of parties should be gathered as to whether the rent was meant to be fixed in perpetuity, because this provision is based upon the assumption that where a landlord fixes a rent in perpetuity, he means the tenure to be perpetual too.

Transfer and succession.—The heritability of a permanent tenure goes by its definition s. 3 (8), and that of an occupancy holding by s. 26, but a raiyat at a fixed

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rate will be governed by the provisions with respect to succession to a tenure (s. 11). No doubt a nice distinction may be drawn between the 'definition' and the 'provision' of a permanent tenure, but the ultimate result of both is that a permanent tenure is heritable, and therefore under s. 18 a raiyati at a fixed rate is also heritable.

This section does not make all the incidents of a permanent tenure applicable to a *raiyati* holding at fixed rates, but makes only the provisions with respect to transfer and succession applicable:—Nilmony *v.* Mothura Nath, 4 C. W. N. clix (159, notes).

The crops of the raiyat at fixed rates, can be distrained but those of a tenure-holder cannot be—s. 121, *post*. See ss. 11—17 and notes. The fixed raiyat cannot transfer his holding except by a registered instrument and shall have to deposit the landlord's fee and give notice to the Collector on occasions of transfer or succession (ss. 12 to 17). In this respect he will be in a different position from the occupancy-raiyat (see cl. (*d*) of sub-section 3 of s. 178, and notes (*a*) and (*c*) and (*d*) of s. 12). His tenure is, however, transferable *ipso facto* (s. 11).

Ejectment.—See s. 10 and notes; and compare ss. 23 and 25.

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CHAPTER V.

OCCUPANCY-RAIYATS.

General.

19. Every raiyat who immediately before the commencement of this Act has, by the operation of any enactment, by custom or otherwise, a right of occupancy in any land shall, when this Act comes into force, have a right of occupancy in that land.

Continuance of existing occupancy-rights.

This section is retrospective in its operation; so that raiyats who had cultivated or held land for twelve years before the passing of this Act became occupancy-raiyats as soon as it came into force. Such was also the occupancy-raiyat under s. 6 of Act X of 1859.—(Thakuranee Dasse *v.* Bisheshur Mukerji, B. L. R. 1 Sup. Vol., 202; 3 W. R. (Act X), 29.) It also substantially restores the old law. Act X of 1859, while creating a statutory right of occupancy for every raiyat who had cultivated or held land for twelve years, did not expressly destroy or interfere with any similar right created by custom, contract, grant, prescription or otherwise.—See B. L. R., F. B., 326. The object of Act X of 1859 was to re-enact the provisions of existing laws relative to the rights of raiyat and not in any way to destroy those rights. If, therefore, the plaintiff had *gorabundi* tenure existing before the enactment of Act X (and it had been found that the plaintiff's *gorabundi* tenure had been recognized in a long series of decisions commencing from the year 1846), the enactment of the Act in no way deprived him of his rights in that tenure.—(Rajah Lilanunda Bahadur *v.* Nirput Mahaton, 17 W. R., 306,) See notes under s. 20 post.

Effect of repeal of the old Act.

Where a right of occupancy had been acquired under the old Tenancy Act (VIII of 1869) which is repealed by the Bengal Tenancy Act (VIII of 1885), *held* that, apart from the provisions of s. 19 of the latter Act, such right of occupancy was not forfeited by the repeal, there being nothing in the new enactment to deprive any person of a statutory right which had been actually acquired. *Semble.*—The definition of "ryot" in the Bengal Tenancy Act (Act VIII of 1885) is not exhaustive, and there is nothing in that definition which would exclude a person who had taken land for horticultural purposes. —(Hurry Ram *v.* Nursingh Lal, I. L. R., 21 Cal., 129.)

Pending suit.

This section and the following section apply to suits pending at the time this Act came into force.—Jogesur *v.* Aisani, I. L. R., 14 Cal. 553, followed in Parbati Churan *v.* Komoruddin, I. L. R., 14 Cal. 556 (note 1). See also Tupsee *v.* Ramesurum, I. L. R., 15 Cal. 376, F. B.

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Definition of "settled raiyat."

20. (1) Every person who for a period of twelve years, whether wholly or partly before or after the commencement of this Act, has continuously held as a raiyat land situate in any village, whether under a lease or otherwise, shall be deemed to have become, on the expiration of that period, a settled raiyat of that village.

(2) A person shall be deemed, for the purposes of this section, to have continuously held land in a village notwithstanding that the particular land held by him has been different at different times.

(3) A person shall be deemed, for the purposes of this section, to have held as a raiyat any land held as a *raiyat* by a person whose heir he is.

(4) Land held by two or more co-sharers as a raiyati holding shall be deemed, for the purposes of this section, to have been held as a raiyat by each such co-sharer.

(5) A person shall continue to be a settled raiyat of a village as long as he holds any land as a raiyat in that village and for one year thereafter.

(6) If a raiyat recovers possession of land under section 87, he shall be deemed to have continued to be a settled raiyat notwithstanding his having been out of possession more than a year.

(7) If, in any proceeding under this Act, it is proved or admitted that a person holds any land as a raiyat, it shall, as between him and the landlord under whom he holds the land, be presumed, for the purposes of this section, until the contrary is proved or admitted, that he has for twelve years continuously held that land or some part of it as a *raiyat*.

The old Acts.

Section 6 of Act VIII of 1869 ran as follows: "Every raiyat who shall have (has—Act X of 1859 section 6) cultivated or held land for a period of twelve years shall have (has—Act X of 1859, section 6) a right of occupancy in the land so cultivated or held by him, whether it be held under potta or not, so long as he pays the rent payable on account of the same; but this rule does not apply to Khamar Neej-jote or Seer land belonging to the proprietor of the estate or tenure and let by him on lease for a term

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or year by year, nor (as respects the actual cultivator) to lands sub-let for a term, or year by year, by a raiyat having a right of occupancy. The holding of the father or other person from whom a raiyat inherits, shall be deemed to be the holding of the raiyat within the meaning of this section."

This section should be read with cls. (2) and (3) of s. 5 as well as Chaps. XI and XV of the Act. The old Acts had "every raiyat who shall have (or has—Act X of 1859) cultivated or held." Under the old law the term raiyat was not defined. The present Act defines it in cls. (2) and (3) of s. 5. Reading, therefore, this section with the definition of "raiyat" it would seem that two things are primarily necessary to constitute a settled raiyat. He must (1) be a raiyat and not a trespasser or middle-man (tenure-holder) or even an under-raiyat; (2) he must hold for the purposes of cultivation. This section would therefore apply merely to raiyats who pay rent for the land they hold and cultivate; and where a person by his own confession does not fall within the category of a raiyat, he cannot claim to be a settled raiyat. Thus

Trespasser.

occupation by a trespasser could not confer a right under this Act, and could not be taken into account in considering whether a person had occupied as a raiyat for twelve years. —(Sheik Peer Box *v.* Sheik Meeah Jan, W R., Sp., F. B., 146; Gholam Hyder *v.* Poorno Chunder, 3 W. R., Act X, 147; Ghareeb Mundle *v.* Bhubon Muhon, 2 W. R., Act X, 85.) In Sreemuty Uma Sundari *v.* Kishori Mohun, 8 W. R., 238, the zeminder obtained a decree against a raiyat for assessment on the ground that the raiyat held under an invalid lakheraj, but instead of assessing turned the raiyat out of possession; it was held that suit by the raiyat for recovery of land on the ground of anterior possession is not sustainable, and the raiyat must prove his title as against the zeminder, his anterior possession under the invalid lakheraj, the decision as to which he did not sue to set aside within proper time, being the possession of a mere trespasser and not that of an occupancy-raiyat. A party who has been in the occupancy of land without paying any rent is not entitled to the protection of Act VIII (B. C.) of 1869, s. 6 and s. 22, even on the ground of a right to hold the land rent-free.—(Kalee Krishna *v.* Shashani Dassi, 24 W. R., 52.) In Ishan Chunder *v.* Hurish Chunder, 18 W. R., 19; 10 B. L. R., App. 5, plaintiff having in a former suit obtained a declaration that certain land was his mál land and not defendant's lakheraj, brought a suit for khas possession; it was held that the defendant's holding either as a korfadar (sub-lessee) or as a trespasser gave him no right of occupancy under s. 6, Act X of 1859, and that his erection of a mud-house on the land and dwelling there for more than twelve years afforded no presumption of acquiescence on the part of the plaintiff. Mere possession, however, of a permissive character and without any right cannot confer a right of occupancy.—(Meherali Khan *v.* Ramrutun, 21 W. R., 400; Addoyta Churan *v.* Peter Dass, 17 W. R., 383; Kabeel Shaha *v.* Radha Kishen, 16 W. R., 146.) A raiyat who secretly possesses himself of land and pays no rent for it has no right of occupancy in that land.—(Ghareeb Mundle *v.* Bhoobun Mohun, 2 W. R., Act X, 86; Gholam Hyder *v.* Poorno Chunder, 3 W. R., Act X, 147.) Possession obtained and continued by fraud is not possession within the meaning of this

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section.—(Bhoobunjoy Acharjee *v.* Ram Narain, 9 W. R., 449); and mere possession in the capacity of servant does not create the right.—(Wooma Moye *v.* Bokoo Behara, 13 W. R., 333.) In Hurro Gobindo *v.* Ramrutun, I. L. R., 4 Cal., 67, Garth, C. J., observed: "We are very much disposed to think that if the defendants held by a service tenure they could not acquire a right of occupancy; however, it is not necessary to decide that point on this occasion." In the same way a person occupying merely as the assignee of the zemindar and cultivating because of the opportunity thus afforded, cannot claim the benefit of this section.—(Wooma Nath *v.* Kundun Tewari, 19 W. R., 177.)

Middleman or tenure-holder.

A possession which amounts simply to a mostagiri right to collect rents from raiyats is not such a possession as confers a right of occupancy.—(Lala Ishur *v.* Bhola Chowdry, 17 W. R., 242.) The cultivation under the capacity of a ticcadar would not give him a right of occupancy.—(Ram Surun *v.* Veryag Mahata, 25 W. R., 554; Thomas Savi *v.* Punchanun Roy, 25 W. R., 502; compare Mukundalal Doobe *v.* Crowdy, 17 W. R., 274.) Persons who do not hold land as raiyats or in any other sense than as middlemen receiving rent from the actual cultivators are not within the purview of this section.—(Gopee Mohun *v.* Sheeb Chunder, 1 W. R., 68; Hurish Chunder *v.* Alexander, Marsh., 479.) Right of occupancy could not be acquired by a tenant holding under a zeripeshgi constituting a security for money advanced.—Bengal Indigo Co. *v.* Raghubur, I. L. R., 24 Cal. 272. An under-raiyat who is not a raiyat under s. 4 and cl. (3) of s. 5 cannot be a settled raiyat. —(Ketul Gain *v.* Nadur, 6 W. R., 168; Moulavi Abdul Jubbur *v* Kalee Charan, 7 W. R., 81; Haran Chunder *v.* Mookta Sundari, 1 B. L. R., A. C., 81; 10 W. R., 113; Nil Kumul *v.* Danesh Sheik, 15 W. R., 469; Unnopurna *v.* Radha Mohun. 19 W. R., 95; Gilmore *v.* Surbessuri, W. R., Sp., Act X, 72; Hurreehur *v.* Jadu Nath, 7 W. R., 114; Ishan Chunder *v.* Hurish Chunder, 18 W. R., 19; Kalee Kisto *v.* Ram Churan, 9 W. R., 344.) The new section seems to go far beyond the old law; no person who is an under-raiyat, even if he be holding under an occupancy-raiyat, or a raiyat at fixed rates, can be now a settled raiyat. This is virtually over-riding the decision of Ramdhun Khan *v.* Haradhun, 12 W. R. 404. In that case Markby, J., observed: "Section 6 does not exclude from the acquisition of the right of occupancy those persons who hold from raiyats, but only those persons who hold from raiyats themselves having no right of occupancy." The new law, however, does not admit an under-raiyat to be a raiyat at all, and ss. 20 and 21 purport to confer fixity of tenure upon raiyats and not under-raiyats.

Under-raiyat.

It follows from the definition of 'raiyat' that the land must be used for agricultural purposes, otherwise no right of occupancy is acquired. Thus it was held that a tenant who had obtained a plot of ground for building a house obtained no right of occupancy in the land. "The occupation," said Phear, J., "intended to be protected by this section (section 6, Act X), is occupation of land considered as the subject of agricultural or horticultural cultivation and used for the purposes incidental thereto, such as for the site of

For the purposes of Cultivation.

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the homestead the raiyat or mali's dwelling-house and so on. I do not think that it includes occupation, the main object of which is the dwelling-house itself, and where the cultivation of the soil, if any there be, is entirely subordinate to that. I had occasion in the case of Khellut Chunder *v.* Amirto, reported in the first volume of the Indian Jurist, New Series, 426, to consider the matter very fully, and I see no reason now to alter the opinion which I then expressed"—(Kalee Kishen *v.* Sreemati Janki, 8 W. R., 250.) Similarly no right of occupancy is acquired in land used for the erection of a school or a church—(Ranee Shornomayi *v.* Blumhardt, 9 W. R., 552.) In Koylash Chunder *v.* Heeralal, 10 W. R., 403, the High Court found that the land which was originally taken for horticultural cultivation being large in quantity (60 beeghas 15 cottas) cannot now be considered as entirely subordinate to the house which was erected on it, and that therefore Act X will apply. But where a tenant who was a breeder of horses, had occupied land for grazing, it was held that he acquired a right of occupancy in it—(Fitzpatrick *v.* Wallace, 11 W. R., 231.) This will now follow from the explanation of clause 2 of section 5 which defines a raiyat. That explanation runs to the following effect: "Where the tenant of a land has the right to bring it under cultivation, he shall be deemed to have acquired a right to hold it for the purpose of cultivation, notwithstanding that he uses it for the purpose of gathering the produce of it or of grazing cattle on it." So that a raiyat will now acquire a right of occupancy in a threshing field or pasture. Act X was not intended to apply to any land, except land of which the main object was cultivation—(Ramdhan *v.* Haradhan, 12 W. R., 404). In the matter of Bromo Moyee Bewa, petitioner, 14 W. R., 252, the Judges differed in opinion; "I have frequently held," observed Jackson, J., "that the provisions of Act X of 1859 did not apply to suits of that description, the land being occupied for the purposes of building, and not agriculturally or in the neighbourhood of lands occupied agriculturally." "I see nothing in the Act," said Mitter, J., "to justify any distinction between suits for arrears of rent on account of land used for agricultural purposes, and suits for arrears of rent on account of land used for other purposes." L. S. Jackson, J.' s opinion prevailed. Compare Madun Mohan *v.* Stalkart, 17 W. R., 441; Kalee Mohan *v.* Kalee Kristo, 11 W. R., 183; Church *v.* Ram Toonoo, 11 W. R., 547; Rani Doorga *v.* Bibi Omedunnessa, 17 W. R., 151. *Per contra* it has been held that a suit could be brought under Act X for arrears of rent due on account of land used for building purposes—(Braja Nath *v.* Gopee Nath, 17 W. R., 183; Watson *v.* Gobindo Chundra Sp. W. R., (Act X), 46; Sheik Nasirali *v.* Sadutali, Id., 102; Bipro Das *v.* Wollen, 1 W. R., 223; Tarini Prosad *v.* Bengal I. Company, 2 W. R., (Act X), 9; Mathoora Nath *v.* Campbell 15 W. R., 463. The whole question was, however, settled by the Full Bench decision in Ranee Durga Sundari *v.* Bibi Omedunnessa, 18 W. R., 235. The new Act has adopted the view of the Full Bench decision, and has taken particular care to lay down that a settled raiyat must be a cultivator, and must hold his land for the purpose of cultivation. The right of occupancy acquired by a cultivator under Act X of 1859, or Act VIII (B. C.) of 1869, is, however, as applicable to that portion of the land which is used for habitation as for that portion which is cultivated. In

Homestead.

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Mohesh Chunder *v.* Bisho Nath Doss, 24 W.R., 402, Markby, J. observed: "I do not think it necessary to go through all the cases which have been referred to, but I think it desirable to refer to what I believe is the earliest case upon the subject, namely, the decision in 8 Weekly Reporter. p. 250. There the land in respect of which the right of occupancy was claimed was a piece of land let to a widow for the construction of a *basha-bari*. Mr. Justice Phear was of opinion that Act X of 1859 was not applicable to land let for such a purpose. In that judgment, Mr. Justice Bayley concurred; but he is particularly careful to point out that that decision would not apply to *bastoo* lands such as might be met with in an ordinary cultivator's holding, thereby clearly showing that, in the opinion of Mr. Justice Bayley, *bastoo* lands in an ordinary cultivator's holding would be the subject of provisions of Act X of 1859, and now of Act VIII of 1869 (B. C.). I am not aware that that opinion has been dissented from in any other case. It certainly would be a matter, I think, of some surprise if a raiyat with an ordinary holding, and having built his house upon a portion of it, were to find that, although he had a right of occupancy as to the culturable land, he had not a right of occupancy as to the rest. Both the Courts below have held that the land occupied for dwelling purposes by the cultivator is protected in the same way as the remainder of the tenure, and I think in so deciding those Courts have acted entirely in accordance with the law." This view it seems will obtain under the new Act, because though the definition of 'raiyat' does not save his habitation, sub-clause (*f*) of clause (2) of section 76 makes the erection of a dwelling-house by the raiyat to be an improvement. Indeed it appears to me that ss. 20 and 21 should be read with ss. 76 and 77 and 79 of the Act, so that the improvements mentioned in ss. 76 and 79 would be no bar to the retention or acquisition of the status of a settled or occupancy-raiyat. Where the rent for *bastoo* land was paid by the raiyats to their landlords separately from the rent paid for the cultivated lands, but the tenure of the *bastoo* lands was a raiyatwar tenure, it was held that, as a matter of law, the distinction in the mode of paying rent did not exclude those lands from the operation of Act X of 1859 or Act VIII (B. C.) of 1869—W. S. N. Pogose *v.* Rajoo Dhoopee, 22 W. R., 511, *per* Markby, J. Similarly it has been held that *bastoo* land upon which the raiyat's house is built, does not fall within the definition of land for building purposes.—(Naimadha Jowardar *v.* Scott Moncrieff, 3 B. L. R., A. C., 283; 12 W. R., 140.) A landlord who allows his tenant to invest capital in erecting buildings on land let for cultivation, and raises no objection for a considerable number of years, will not be allowed to disturb the holding. The fact of the building having been allowed to remain is *primâ facie* proof that the land was let for building purposes—Brojo Nath Chowdry *v.* Steuart, 8 B. L. R., App., 51; 16 W. R., 216. A raiyat who relies upon a right of occupancy must be taken as admitting that the letting was of such a character as is contemplated by Act VIII of 1869 (B. C.) which applies only to agricultural holdings. Where land was let on the understanding that it was to be used for cultivation, the fact that the raiyat has acquired a right of occupancy does not alter any of the terms of the letting, except the conditions (if any) fixing a term for the tenancy. The statutory right of occupancy cannot be extended so as to make it include complete dominion over the

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land subject only to the payment of a rent liable to be enhanced on certain conditions. The landlord is still entitled to insist that the land shall be used for the purposes for which it was granted; and although a liberal construction may be adopted, it cannot extend to a complete change in the mode of enjoyment—(Baboo Lal Sahoo *v.* Deonarain Singh, 1 C. L. R., 294; I. L. R., 3 Cal., 781). This case was distinguished in Prosunno Kumar *v.* Jugunnath Bysak, 10 C. L. R., 25, and it was held that where land has, with the consent of the landlord, ceased to be agricultural, and the tenant has since built a homestead, or used part of it for tanks or gardens, the nature of the tenure is not thereby changed, nor is the tenant thereby deprived of any right of occupancy which he might have acquired. See cases cited *post* under the heading of *Land situate in the village.*

Firm or capitalists.

An indigo concern or firm has no corporate or legal existence, so far as the question of a right of occupancy is concerned, which can only be recognized in particular individuals.—(Cannan *v.* Koylash Chunder, 25 W. R., 117; Rai Kumal Dasi *v.* J. W. Laidley I. L. R., 4 Cal., 957.) Jackson, J., observed in this case: "It appears to me that in point of fact to apply the terms of section 6 to a holding such as the present would be to extend the meaning of s. 6 to a most inordinate and dangerous degree. It is no doubt the case that, when a raiyat holds land which he may cultivate, the circumstance that he has sub-let that land to an under-tenant does not deprive him of the right of occupancy, or prevent such a right growing up. But the case is altogether different when the tenure is of such a nature that it could not be within the means of occupancy or cultivation of a particular raiyat, and here the fact is that there is no particular individual raiyat. Here is an association of persons constituting a firm who have a large capital, and who devote their energy to the improvement of the soil for the benefit of the country and also for their own benefit, and in respect of such a body, there is also an authority directly bearing on the case. In the case of Cannan *v.* Koylash Chunder, 25 W. R., 117, decided by Mr. Justice Macpherson and my brother Morris, it was expressly held that the Agra Bank, as the representative of an indigo-concern or firm, could not be regarded as entitled to plead a right of occupancy. They said,—'an indigo concern or firm has no corporate or legal existence which we can recognize in a suit like this. So far as the question of a right of occupancy is concerned, all that we can look at is occupancy by particular individuals; and as far as such occupation of this land goes, the present appeal fails.' In those observations we concur, and it would be impossible, we think, to hold that a firm or partnership could take the grant of land and by arrangement among themselves, continuing for a series of years by changes in the partnership, hand over the land from one person to another under the guise of a right of occupancy. What the firm of Robert Watson & Co. took from the zemindars in this case was not a raiyat's tenure for the purpose of ordinary agricultural use. It was a tract of land amounting to an estate to be worked by them by means of capital for the purpose of carrying out a particular speculation. It appears to me that neither the terms of Act X of 1859, nor of Bengal Act VIII of 1869, contemplate the right of occupancy growing up in such a case as this."

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In a recent case Mr. Justice Field would not follow the decision of Cannan *v.* Koylash Chunder, 25 W. R., 117, or of Rai Kumal Dasi *v.* Laidley, I. L. R., 4 Cal., 957. With reference to the first he said, "the report does not show the particular facts of the case with reference to which these observations of the learned Judge were made. We do not know who were the persons who constituted the indigo concern or firm, or whether their names were upon the record, or whether there was any evidence to show that these persons had held for 12 years after they had obtained possession." With reference to the second case he observed: "It is clear from the potta given at p. 955 that this was a case of an ijara lease, and that it was not like the present, which is a case of a jote-dari lease, that is a cultivating lease." Distinguishing thus from these decisions the case under consideration, he continued: "We think that this was a cultivating lease—a lease granted to the lessees for the purpose of cultivating indigo; and so long as cultivation is contemplated, we think it is immaterial whether the cultivation intended is that of rice, jute, indigo or other crop. But then it is said that this was a lease granted to the firm of Robert Watson & Co., and under such a lease particular individuals cannot acquire a right of occupancy. If this lease had been drawn up by skilled legal agency, instead of Robert Watson & Co., there would have been inserted the names of the persons who then were members of that partnership. But inasmuch as the names of these persons could be ascertained on the principle *id certum est quod certum reddi potest*, we think that this must be taken to be a lease to the individuals who were at the time members of the firm of Robert Watson & Co., and the lessee acquired a right of occupancy.—(Laidley *v.* Gour Govind, I. L. R., 11 Cal., 501.) It is doubtful if Mr. Justice Field was correct in this view. The whole Act would show that the word 'raiyat' in section 6 of Act X of 1859 or Act VIII of 1869 B. C. was meant to protect a *bonâ fide* cultivator as he is ordinarily knowu in the peasantry of Bengal, and not an association of persons. In our ordinary parlance, by the word 'raiyat' we do not understand a collection, body or firm but a raiyat simple and pure. The question, however, will not be free from doubt under the definitions of the new Act. The definition of a 'settled raiyat' begins with the word 'person,' and a 'person' under the General Clauses' Act (see *ante*, p. 25) includes incorporated associations of persons. No doubt this definition is controlled by the words 'as a raiyat'" (*i. e.*, the 'person' must hold 'as a raiyat' or he cannot grow into a settled raiyat), but the definition of the word 'raiyat' in section 5 is rather wide, and would include a 'person' who would cultivate by hired servants and therefore an association of persons or a firm. An indigo or tea cultivating firm would not fall under the definition of tenure-holder because its purpose is not to collect rent or to bring the land under cultivation by establishing tenants upon it, but it may fall under the definition of a raiyat because its object is to cultivate the land by hired servants. This view which follows from sections 20 and 5 together can only be met on the ground that the object of the Bengal Tenancy Act was to amend and consolidate existing law with regard to the landlord and tenant, and not to revolutionise things, and that the application of the theory would be fraught with many

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evil consequence because by reading sections 20 and 21, and 175 of the Act, together, all the indigo and tea concerns in this country would under this view be converted on the date of the operation of the Act into occupancy raiyats, in spite of any contract to the contrary. In sections 20, 21, 25 and 178 the object of the Legislature obviously was to protect weak persons from evictions, and to encourage the growth of occupancy right in them at the expense of the laws of contract. If provisions made with this view be applied in favour of strong persons like an organised association, it would be a hardship upon the zemindars, and they would refuse in future to admit any firm into their zemindari, a consequence which would be prejudicial to the interests of the country. The equitable view should, therefore, be that which has been adopted by Mr. Justice Jackson in Rai Kamal Dasi, quoted above. Though an indigo or other firm may technically fall under the definition of 'raiyat' in section 5, we must not forget that under its sub-section we must have regard to 'local custom' to determine whether a tenant is a tenure-holder or a raiyat, and an indigo-planter or a firm of a similar nature will hardly be considered as a raiyat in the general acceptance of the country.

The definition of the word 'raiyat' as given in section 5 does not include necessary element of payment of rent. To hold for the purpose of cultivation is sufficient to make a person a raiyat, though his interest must be a subordinate interest to the superior holder. Hence, whether a raiyat pays rent in kind or cash he acquires a right of occupancy by 12 years' possession. Therefore it has been held that ordinarily a holding under a *bhagdhari* tenure(*i.e.*, where the rent consists of a portion of the produce) would establish a right of occupancy under section 6, Act X of 1859—(Hurrehur *v.* Bissessur, 6 W. R., (Act X), 17.) So a *bhaoli* tenure may be a *goosusta* tenure, and a raiyat who pays rent in kind and is in possession of or cultivates land for a period of twelve years has a right of occupancy in the land so held or cultivated by him, so long as he pays the rent in kind for the same—(Jutto Moar *v.* Musst. Basmutt Koer, 15 W. R., 479.) It is not essential to the acquisition of occupancy rights that the raiyat should have paid rent in respect of the land. It is sufficient, under section 6 of Act VIII of 1869 B. C. that the person claiming to have acquired such rights should have cultivated or occupied the land for a period of twelve years, and should be a raiyat —(Narain Roy *v.* Opnit Misser, 11 C. L. R., 417). After reciting section 6, Mitter, J., observed: "It is clear from the language of the section that for the acquiring of the right of occupancy two conditions are only necessary, viz., (1) the cultivation or holding of land for 12 years, and (2) that the person holding or cultivating should be a raiyat. No doubt in many cases the fact of non-payment of rent would be a valid ground for holding that the land was held by a person not as a raiyat but as a trespasser. But where notwithstanding non-payment of rent the holding or cultivation as a raiyat is established for 12 years, the essential conditions of the section are fulfilled. The Moonsiff was of opinion that the words "so long as he pays the rent payable on account of the same" show that the payment of the rent is an essential requisite for the acquiring of the right of occupancy. But he is mistaken in this, because the section

Bhagdhari and bhaoli tenants.

Payment of rent not essential.

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says that a raiyat, &c., shall have a right of occupancy so long as he pays rent, &c., *i. e.*, a raiyat who fulfils the two conditions mentioned above shall have a right to occupy the land (which means he cannot be evicted against his will) so long as he pays rent, &c. Therefore the acquiring of a right of occupancy is dependent only upon the two conditions mentioned above, but the maintaining of it is further dependent upon another condition, *viz.*, payment of rent. It was contended that it would be anomalous to hold that, although a right of occupancy may be acquired by a raiyat who has not paid any rent, yet the moment it is acquired it would be extinguished if the payment of the rent be withheld. But reading section 6 along with sections 22 and 52 of the Rent Act, it would appear that the construction we adopt is not open to this objection. No doubt non-payment of rent works as a forfeiture of the rights of occupancy and renders a raiyat, whether he has a right of occupancy or not, liable to be evicted (see section 22). But a raiyat having a right of occupancy cannot be evicted, otherwise than in execution of a decree or order under the provisions of the Rent Act. Therefore before a landlord can really reap the benefit of the forfeiture of a right of occupancy incurred by non-payment of rent, he must bring a suit to eject the raiyat, and whenever such a suit will be brought, the raiyat will have the power to prevent the forfeiture by paying the arrears of rent under the provisions of section 52. In this respect section 52 makes no difference between an occupant and a non-occupant raiyat. Both have the same privilege of preventing eviction by the payment of the arrears of rent within a certain time." But the mere omission to pay rent for five years does not, of itself, amount to forfeiture of a raiyat's right of occupancy, and will not be sufficient to sustain an action by the landlord for the recovery of the raiyats' holding—(Musryatulla *v.* Noorzahan I. L. R., 9 Cal,, 808; Brojendra Kumar *v.* Bungo Chunder Mundle, 12 C. L. R., 389.) Where, however, a tenant having a right of occupancy abandons holding and ceases to pay rent for five years, it is not a right construction of section 22 of Bengal Act VIII of 1869, to say that the landlord may not put another tenant into possession without the formality of a suit. Section 6 of Bengal Act VIII of 1869 expressly limits the duration of occupancy right by the words "so long as he pays the rent payable on account of the same," and distinct abandonment and cessation to pay rent disentitle the tenant from enforcing the rights which he may have previously enjoyed—(Golam Ali *v.* Golap Sundari, I. L. R., 8 Cal., 612.) Where a raiyat had been in possession of land, but had been dispossessed and for some years previous to suit had failed to pay rent, it was held that at the time of the institution of a suit for recovery of possession, he had no subsisting title and consequently his suit must fail.—(Hem Chunder *v.* Chand Akund, I. L. R,, 12 Cal., 115.) Where land held by tenants with right of occupancy was completely submerged for a number of years, and during the period of such submersion, no rent was paid by the tenants—*Held*, that the tenants had, by non-payment of rent during the period of submersion, forfeited their rights of occupancy—(Hem Nath *v.* Ashgur Sardar, I. L. R., 4 Cal., 894.)

A co-sharer, by holding under other co-sharers, cannot acquire any right of occupancy—(Raghubur *v.* Bishnu Dutt, 2 W. R., Act X, 92). A joint owner under a

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mutual agreement by all the co-sharers, who pays rent for his right of occupancy, is not a raiyat in the sense contemplated in section 4, Act X—(4 W. R., Act X, 48; Miturjit Singh *v.* Mr. W. Fitzpatrick, 11 W. R, 206). The question will, however, depend upon the nature of the holding, *e. g.*, whether he holds as a co-sharer or as a raiyat. Where a co-sharer occupies a larger portion than his own share or the wole estate, by renting the land he occupies from one or more of his co-sharers, he may be sued for that rent under Act X of 1859 by the person or persons with whom he engaged—(Kalee Persad *v.* Shah Latafut, 12 W. R., 418.) "The question as to whether the parties," observed Jackson, J., in this case, "were landlord and tenant or not, is a question of fact. I am not prepared to hold that in no case can a co-sharer in an estate be a tenant of another co-sharer. I understand the Judge also would not go so far as this. Then what are the circumstances which would establish that relationship? The Judge says 'attornment or otherwise.' It is stated in this suit that relationship is established by the acts of the parties; by the fact that each co-sharer paid his fellow co-sharer directly the whole amount of rent due to him, and under the law applicable only to landlords and tenants brought suits for rent and obtained decrees; and that specially the defendant in this suit, when in exactly the same position as the present plaintiff, stated that he was the plaintiff's landlord and sued him for rent for land held by the plaintiff as farmer of the defendant's co-sharer; and I think that the act of the defendant in bringing his suit was a virtual admission that as regards such tenures as the plaintiff now sues to recover rent upon, the parties stood in the relationship of landlord and tenant. The Judge was therefore wrong in law in holding that it was no evidence of the fact. There is evidence in the case, both oral and documentary, that the different co-sharers do recover their rents directly from each other according to their shares." The same view has been adopted in Gooroo Prosunno *v.* Gobinda Prosad, 1 W. R., 34. The mere fact of a division of a parent estate, however, does not reduce a party to the position of a raiyat not liable to ejectment—(Lalit Narain *v.* Gopal, 9 W. R., 145.) A butwara, on the other hand, does not extinguish the rights of tenants, nor does the fact of one of the proprietors being the tenant destroy his tenant right, because another has had the land allotted as part of his share—(Nathulal Chowdry *v.* Sadatlal, Sp., W. R., 271.) A holding for twelve years uuder one of several co-proprietors gives a right of occupancy under section 6, Act X of 1859, provided the tenant has paid rent which payment he may, in the absence of fraud, make to any one of the co-proprietors whom he chooses—(Mooktakeshi *v.* Koylash Chunder, 7 W. R., 493. Compare Ranee Sarutsundari Debia *v.* Mr. Charles Binny, 25 W. R., 347 at p. 350; L. R. 5 I. A. 168.) See notes under s. 22 *post*.

Co-sharers.

A possession which amounts simply to a *moostagiri* right to collect rents from raiyats is not such a possession as confers a right of occupancy—(Lalla Ishur Dutt *v.* Bhaka Chowdry, 17 W. R., 242.) A ticcadar occupying land merely as the assignee of the zemindar, and cultivating because of the opportunity thus afforded, cannot, under

Ticca, moostagiri, proprietorship, and merger.

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colour of that character, claim the right of occupancy under s. 6, Act X.—(Uma Nath Tewari *v.* Koondon Tewari, 19 W. R., 177.) A ticca lease cannot confer a right of occupancy, and the ticcadar is bound to restore his holding to the zemindar in the condition in which he got it when his lease is over.—(Ramsarun Sahoo and Junki Sahoo for self and guardian of Ram Kalwan Sahoo, Ramphul Mahaton and Gunga Bishen Rawat *v.* Veryag Mahaton, 25 W. R., 554.) Where a person held raiyati lands alternately as cultivator and farmer for about 50 years—*Held*, that his cultivation for broken periods would not deprive him of his right of occupancy under s. 6, Act X, and that the doctrine of merger did not apply to such cases.—(Mokundalal Doobe *v.* L. G., Crowdy, 17 W, R., 274; 8 B. L. R., App., 95.) Where a person holding some land at first as a raiyat, subsequently obtained a farming lease of it, and thus became assignee of the landlord's interest, and took advantage of his position to allow himself to acquire a right of occupancy as a raiyat *held* that the proprietor, on the termination of the farming lease, was entitled to have the land back free of all encumbrances. Although the doctrine of merger does not hold in this country, and the same person may hold a piece of land both as raiyat and farmer distinctly, yet, as the raiyat's occupation is a possession adverse to that of the landlord, it follows that in any case in which, in consequence of the two interests being held by the same person, the landlord's will and restraining power as against the tenant are in abeyance, the raiyat's right is also so far in abeyance that it cannot undergo any change until the landlord's rights are released from the custody of the tenant. Where a raiyati interest co-exists with a farming title, the raiyati interest must remain unchanged in character during the currency of the farming lease—(Thomas Savi *v.* Panchanan, 25 W. R., 503.) In a suit by the purchaser in 1878 at a Government revenue sale against the former proprietor for possession of the land sold, the defendant alleged that his predecessors in title purchased the land from Government in 1861, and that he and his predecessors in title held it till 1878, but that his predecessors in title, in addition to holding an absolute gujastadari right, had been in possession as occupancy-raiyats since 1263. *Held* (1) that the defendant was not entitled to claim occupancy-rights through his predecessors in title as he had not inherited from them, and (2) that during the period he held possession as proprietor the power to acquire a right of occupancy under s. 6 of Act VIII of 1869 B. C. was in abeyance.—(Lal Bahadur Singh *v.* E. Solano, 12 C. L. R., 559; I. L. R., 10 Cal., 45.) The judgment in this case runs thus: "In an unreported case, *viz.*, Regular Appeal No. 152 of 1877, decided on the 25th February 1879—Kishen Prosad Singh *v.* Rajah Radha Pershad Singh, Garth, C. J., with reference to the contention put forward in that case, *viz.*, that one of the parties was entitled to a right of occupancy as he had held the lands in suit in that case in the double capacity of a raiyat and as proprietor, said: 'But we think that this view is contrary both to the letter and spirit of the Rent Law. A man cannot occupy the double character of landlord and raiyat, or make a pretence of paying rent to himself for the purpose of acquiring an occupancy-right against other people.' It was held in that case that under the circumstances no right of occupancy could be acquired. The Chief Justice was of opinion that a

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raiyati holding would merge in the proprietary interest after the purchase of the latter. It is not necessary for us to express any opinion upon this question, *viz.*, whether a raiyati interest merges and becomes extinguished as soon as the raiyat purchases the estate in which the raiyati holding is situated, but the learned Chief Justice held in this case for the reasons given in his judgment that the raiyats could not acquire a right of occupancy under the circumstances set forth above. In the case of Savi *v.* Panchanan, 25 W. R., 503, it was held that, although a raiyati right would not merge, still it would remain in abeyance so long as the raiyat would be in possession of the estate in another capacity. Mr. Justice Ainslie, who delivered the judgment in that case, was also one of the Judges in another case reported in 17 W. R. 274. That case was decided by Mr. Justice Loch and Mr. Justice Ainslie. At first sight it would appear that that case was inconsistent with the decision of the learned Chief Justice referred to above, but the explanation that Mr. Justice Ainslie gave of his views upon the subject in the latter case of Savi *v.* Panchanan, goes to show that so far as the actual decision of the subject is concerned, there is no inconsistency between the decision in 17 W. R., 274, and the unreported case cited above. Both in the cases reported in 17 W. R., 174, and 25 W. R., 503, the Judges held that, though the raiyati interest did not merge, yet so long as the raiyat remained in possession of the land in a double capacity *i. e.*, as landlord and as raiyat, he could not acquire a right of occupancy under section 6 of Act VIII of 1867 (B. C.) In this view we entirely concur. Section 6 provides that cultivation or holding for a period of twelve years confers upon a raiyat a right of occupancy, *i. e.*, a right to remain upon the land against the will of the landlord. This right of occupancy must, therefore, be acquired against somebody, and if the raiyat is in possession of the land in a double capacity both as a raiyat and as a malik, it is almost impossible to conceive how he can under these cirumstances acquire a right of occupancy against himself. Therefore a reasonable view of the law is, that during the time a raiyat remains in possession of the land in such double capacity, the operation of the acquisition of the right of tenancy remains in abeyance."—*Per* Mitter and Wilkinson, JJ. For a fuller judgment of the cases, reported in 25 W. R., 503, and 17 W. R., 174, see notes under s. 22, *post*.

The proprietor holding benami.

The right of occupancy is a right given to a raiyat continuing only so long as the raiyat pays rent for the land he holds, and though it cannot be affected by a wrongful eviction, still when the zemindar acquires the land by purchase and takes possession, even in the benami name of a third party, seeing that he cannot pay rent to himself, the right is gone and cannot be subsequently revived.—(Radha Govind *v.* Rakhal Das, I. L. R., 12 Cal., 82.)

A right of occupancy will grow even under a trespasser.

A raiyat occupying and cultivating land for more than twelve years under a landlord who has no title to the land, nevertheless acquires a right of occupancy. The right is one which is not conferred by any lessor, but which, by virtue of the law, grows up in the raiyat from the mere circumstance of cultivating the land for twelve years or upwards and paying rent due thereon.—(Zoolfan Bibi *v.* Radhika Prosuno,

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I. L. R., 3 Cal., 560; Syud Amer Hossein *v.* Sheo Suhae, 19 W. R., 383; Pandit Sheo Prokash *v.* Ram Sahai, 8 B. L. R., 165.) If land was let by one of several owners, the raiyat will acquire a right of occupancy.—(Muktakesi *v.* Kailas Chunder, 7 W. R. 493.)

For a period of twelve years continuously, &c.—This section has a retrospective operation. So under Act X of 1859, it was held that the Legislature intended that a holding for twelve years, whether wholly before or wholly after, or partly before and partly after the passing of Act X of 1859, should entitle a raiyat of occupancy.—(Thakurani Dasi *v.* Bishessur Mukerji, 3 W.R., Act X, 29 F.B.) A potta granted previous to the date of the passing of Act X is subject to the same rules of interpretation as a potta granted subsequent to that date, and the proviso contained in the following section would equally apply to pottas granted before or after the promulgation of Act X.—(Pandit Sheo Prokash *v.* Ram Shakoon, 17 W. R., F. B., 62). The

Continuous possession.

continuous possession for twelve years, which is the subject of this section, must be a possession under one and the same right. "In our opinion," remarked Macpherson, J., "the right of occupancy acquired under section 6 must be an occupancy of one and the same kind, that is to say, it must be occupancy by the person pleading it, or by his father or some other person from whom he inherits. Here the first five year's occupancy relied on by the plaintiff were 12 years during which the land was cultivated and held, not by the plaintiff alone, but by the plaintiff and Khoda Bux. It seems to us that this is a distinct and different holding from the subsequent holding by the plaintiff alone. The plaintiff has therefore failed to prove that he cultivated or held the land for twelve years, and thereby acquired a right of occupancy."—(Sheik Mahomed Chaman *v.* Ram Persad Bhukat, 8 B. L. R., 338; 22 W. R., 52, note.) This decision has been expressly over-ridden by cl. 4 of s. 20 of the new Act. In A. J. Forbes *v.* Ramlal Biswas, 22 W. R., 51, Phear J., said: "This right may be in its inception joint with other persons; for if, by the death of co-sharers, it had ultimately become a sole right in the plaintiff himself, still it would have been continuos throughout in its nature." Land which is held as one tenure is either subject to a right of occupancy as a whole or it is subject to any rights of occupancy as to any part of it. If the whole land has been held for more than twelve years then the tenant has a right of occupancy, but if within twelve years the tenant has been allowed to take possession of fresh lands, and such addition was intended to create fresh tenure, then as regards the whole a right of occupancy has not been acquired, although a portion has been held for more than twelve years—(Amar Chand. *v.* Bukshee Pyekar, 22 W. R., 225). This decision will not be operative under the new Act. Under clause (2) of section 20, and clause (1) of section 21, the raiyat would acquire a right of occupancy to the whole land in the above case. Whether the land has been held under renewed leases or a continuous lease is not material. In either of these cases, holding land as a raiyat, if for a sufficient period, gives a right of occupancy (Khujurunnesa *v.* Ahmed Reza, 11 W. R., 88.) A raiyat who has cultivated or held a piece of land continuously for more than twelve years, but under several written leases or pottas, each for a specific term of years, is entitled to claim a right of occupancy in

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that land. Neither the mere fact of a raiyat taking a lease for a term of years, nor the mere existence of the right of re-entry on the part of the landlord amounts to an express stipulation within the meaning of section 7, Act X of 1859, so as to prevent the right of occupancy being acquired under section 6—(Pundit Sheo Prokash *v.* Ram Sahai, 17 W. R., F. B., 62.) "The whole question," observes Couch, C. J., in this case, "turns upon what is the meaning of an express stipulation contrary to the raiyat acquiring the right of occupancy. Now where there is a potta for a fixed term, no doubt at the expiration of that term, the landlord has a right of re-entry upon the land; and if the raiyat does not give up possession, the landlord may recover the land from him. The landlord need not re-enter upon the land if he does not think fit; he may and often does allow the tenant to remain in possession of the land. I cannot consider that the right of re-entry which arises by reason of the expiration of the term named in the potta can be regarded as an express stipulation that the raiyat shall not, if he occupies the land for more than twelve years, acquire the right of occupancy given by section 6." The difficulty that the learned Judges felt in this case does not now exist. Section 7 has been repealed and clauses (*a*) and (*b*) in sub-section (1) and (3) of section 178 of the Act provide that nothing in any contract between the landlord and tenant shall bar the acquisition of an occupancy right. Similarly in Narain Singh *v.* Munsoor Raoot, 25 W. R., 155, it was held that possession through a succession of pottas, each for a shorter period than twelve years, but altogether carrying a tenure beyond an aggregate term of twelve years, clearly gives a tenant a right of occupancy; yet any solenama filed in the case and purporting to waive any right acquired by the tenant, must be considered. See, however, clauses (*b*) and (*c*) of sub-sections (1) and (3) of section 178 of the present Act. See also 25 W. R., 114. In Golam Panjah *v.* Hurish Chunder, 17 W. R., 552, the raiyat held for more than twelve years under an ijaradar, and at the expiration of the ijara the zemindar contended that his right of occupancy did not grow, and that he is liable to ejectment. Mitter, J., odserved: "It has been said that the possession of the defendants commenced under a jotedari right created in their favor by the ijaradar, and that the plaintiff is not bound to recognise a possession held under such a right, now that the term of the ijara has come to an end. I think this circumstance cannot affect the application of section 6 to this case. That section lays down a particular condition which must be fulfilled in order that a raiyat may claim a right of occupancy, that condition being continuous holding as a raiyat for a period of twelve years. It is not denied that the defendants have held the disputed land as raiyats for that period and upward; and that being so, I cannot understand on what ground it can be contended that the defendants are not entitled to the benefit of the section above referred to." In this case it was also held that a tacit understanding that the ijaradar should give up possession on the expiry of the lease is not an express stipulation within the meaning of section 7 of Act X of 1859, and it was doubted if such an understanding between the zemindar's predecessor and the ijaradar can affect the raiyat. In Mookundo Lal *v.* L. S. Crowdy, 17 W. R., 274, it was held that where a person held raiyati lands alternately as cultivator and ticca lessee or farmer continuously for a period of about fifty years, his cultivation of

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the lands for broken periods would not deprive him of his right of occupancy under section 6, Act X of 1859. Loch, J., observed: "We think the doctrine of merger does not apply to this case, for the defendant, notwithstanding the leases, continued to hold the lands, as he always had done previously, *viz.*, as a cultivator. We do not mean to say that the defendant as lessee could confirm his own right of occupancy. But we think that during the period of the lease, the power of eviction as regards him was in suspense, and when the lease expired he was still, as he had always been, the actual cultivator." Ainslie J., said in the same case: "The lands in the present case are not khamar lands but raiyati lands. They were subject to the accrual of some right in the raiyat other than that derived by express grant from his landlords; and it seems to me that such rights do not merge in ticca leases taken from the zemindar. It has been nowhere proved that in the intervals between the ticca leases the defendant entered into possession under new arrangement with the zemindar. He appears to have continued in possession as a matter of course, and on the expiry of such ticca lease, to have resumed without any question the position he was holding at its commencement. No doubt the defendant as farmer would not, by his own neglect to exercise the powers of the landlord, create for himself any title as raiyat against the zemindar. But, on the other hand, he lost no title or interest that he had as a raiyat. If his raiyati interest be taken or suspended during the whole period of the existence of the leases, we still find that he has been holding for a period of 21 years, and that in the whole term of 47 years commencing in 1231 F. S., his occupation has never been interrupted by the holding of any other raiyat." In Thomas Savi *v.* Panchanan, 25 W. R, 503, the defendant was from Kartic 1272 to Asvin 1278 assignee of the landlord's interest under an ijara lease for six years. It was doubtful if before 1272 he had any raiyati interest in the land, but assuming that he had such a right it would not go beyond 1267. At the expiry of his ijara, he did not quietly surrender the leased property, and consequently a notice was served upon him in Bhadra 1279, calling upon him to abstain from cultivating and to vacate from Kartik of that year. The Court observed (Ainslie, J., delivering the judgment): "It seems to us that the defendant must be taken to have been holding over as farmer for this last year, so that he was in fact assignee of the landlord's interest up to the end of Asvin 1279. He was therefore the person who had the power to terminate the raiyati holding by virtue of which he now claims, and so long as he remained as middleman, the landlord could not come in to deal directly with the raiyats. It was through his own forbearance that the present claim has grown up, and there can be no equity in allowing him to stand by idle in order to create a right in himself adverse to his landlord whose interest he as farmer was bound to protect. Granting that a raiyati interest may co-exist with a farming title, I think it must be held that the co-existing raiyati interest is the same in extent and quality at the end as at the beginning of the lease of the farm. Whatever may be the case as to other tenants, as against the farmer himself, the lessor has a clear right to have compensation for any change to his prejudice caused by him (the farmer) and this not merely by way of damages, but by having the property restored to its original state when this is prac-

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ticable. Thus, if the defendant had no right of occupancy at the commencement of his farming lease, he cannot have acquired one during its currency. This view of the law was taken by Mr. Justice Loch and myself in the case of Mukunda Lal Doobe *v.* Crowdy, 8 B. L. R., App., 95. This view may lead to some difficult questions, but their solution is unnecessary in the present case, for it is only by continuing the raiyati interest to the very last day on which the farming title continued to exist that an occupation of twelve years is made out. Baboo Mohini Mohan Roy contended that under section 6. Act VIII of 1869 (B.C.), the right of occupancy is not limited by any proviso, save that mentioned in section 7, but that it comes into effect absolutely the moment twelve years' continuous occupation as a raiyat has been completed. But then the question is,- what is meant by occupation as a raiyat. I, in effect held, in the case cited, and still hold that it means an occupation which, though subordinate is in a sense adverse to the landlord so far as it qualifies his power of dealing with the land at will. Where there is practically no restraint of the landlord's will, in consequence of the will and the restraining power being in the same person, there can be no opposition (in the qualified sense intended above) to the landlord such as is inherent in the holding of a raiyat, and while this state of things lasts, the raiyati right is in so far in abeyance that it cannot undergo any change in its character." The mere fact that the person to whom a raiyat has for some years paid rent had no title, cannot take away from him the character of raiyat, or prevent him from counting those years in the time necessary to give him a right of occupancy—(Syud Ameer Hossein *v.* Sheo Sahai, 19 W. R., 338.) A raiyat occupying and cultivating land for more than twelve years, under a landlord who has no title to the land acquires a right of occupancy. The right is not one conferred by any lessor. It is a right which by virtue of the law grows up in a raiyat from the mere circumstance of cultivating the land for twelve years and upwards and paying rent due thereon—(Zoolfun Bibi *v.* Radhika Prosunno, I. L. R., 3 Cal., 560; see also Pandit Sheo Prokash *v.* Ram Sahai, 8 B. L. R., 165.) A yearly tenant of a jote cannot claim a right of occupancy under section 6, Act X, by adding the time during which his predecessor held it, even though the jote be transferred with the consent of the zemindar, unless the original jote is proved to have been a perpetual jote. When the jote, not being a perpetual one is transferred even with the consent of the zemindar, the transferee merely acquires a new jote on the terms on which the old tenure was held, but he is not entitled to make up his right of occupancy by adding the time during which his predecessor held it—(Tara Prosad *v.* Soorjo Kanta, 15 W. R., 152). The possession of a father or other ancestor from whom a raiyat inherits may be added in this manner, but not the possession of a vendor—(Hyder Bux *v.* Bhubendradev, 17 W. R., 179. See also 22 W. R., F. B., 22. Also, Messrs. Watson & Co. *v.* Rani Surat Sundari, 7 W. R., 395.) *Per contra* it has been held that where the zemindar consents to the transfer of the tenure from one raiyat to another, the possession of both must be considered continuous and the right of occupancy to date from the time of the first holder—(Huro Chunder *v.* Mr. Dunne, 5 W. R., Act X, 55.) A holding by a raiyat and his father for many years creates a right of occupancy which will prevent

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the zemindar from ousting the raiyat except by due course of law—Nim Chand *v.* Moorari Mundle 8 W. R., 127; Lal Bahadur *v.* Solano, I. L. R., 10 Cal. 45; 12 C. L. R., 559. In a suit by a zemindar, for ejectment when the raiyat pleads continuous possession for twelve years, and it is found that the raiyat was evicted during that period, but got back into possession, the raiyat's right of occupancy will depend on whether the eviction was wrongful or not, the onus being on him to prove that the eviction was wrongful—Mahomed Gazee Chodry *v.* Noor Mahomed, 24 W, R., 324; Lutifannesa *v.* Pulin Bihari, I. L. R., W. R. Sp. F. B. 91; Radha Gobind *v.* Rakhal Das, I.L.R., 12 Cal. 82. See, however, clauses (6) and (7) the present section and section 87 of the Act; Compare Tirthanund *v.* Herdu Jha, I. L. R., 9 Cal. 252. Occupation for twelve years cannot give a right of occupancy where the occupation by the occupant alone did not extend to twelve years, nor was it the occupation of land which he had inherited.—(Kherode Chunder *v.* Mr. D. M. Gordon, 23 W. R., 237.)

Land Situate in the village:—This must be read with the foregoing context "held as a raiyat"; hence land here means agricultural or horticultural land. A tenant is not a raiyat unless he holds the land for the purpose of cultivation. The word 'land' has not been defined. In Act V (B. C.) of 1867, for all subsequent enactments of the Bengal Council, 'land' has been interpreted to 'include houses, buildings and corporeal hereditaments and tenements of any tenure, unless where there are words to exclude houses and buildings or to restrict the meaning to tenements of some particular tenure.' But the present Act being an India Council Act, and the General Clauses' Act (Act I of 1868) not having defined the 'land,' the interpretation given to it in the Bengal Council Act referred to will not hold good. In the original Bill of the Rent Commission an attempt was made to define land, but it was abandoned on account of the intrinsic difficulties attached to it. The draft definition was to the following effect: "Land includes woods and water thereupon: when applied to land cultivated or held by a raiyat, it means land used, or intended to be used, for agricultural or horticultural purposes, or the like. In Chapter XVIII, it means (*a*) tenures, under-tenures, and holdings; (*b*) land used, or let to be used, for agriculture, horticulture, pasture or other similar purpose, or for dwelling houses, manufacture, or other similar buildings; and (*c*) rights of pasturage, forest rights, fisheries, and the like. Explanation:—*Bastu* or homestead land is land used for agricultural purposes when it is occupied by a raiyat, and together with the land cultivated by such raiyat forms a single holding." This definition was subsequently abandoned on account of the difficulties it gave rise to. The words 'held as a raiyat' have simplified the meaning of the word 'land' in this section. See s. 5, cls (2), (3) and (4) and ss. 76 and 79 of the Act. See also notes under cl. 5 of s. 3, *ante*, pp. 31—35. The land must therefore be used for agricultural purposes, otherwise no right of occupancy is acquired. Thus, it was held that a tenant who had obtained a plot of ground for building a house, obtained no right of occupancy in the land. "The occupation," observed, Phear, J., "intended to be protected by this section, is occupation of land considered as the subject of agricultural or horticultural cultivation, and used for purposes

Homestead, building or Church.

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incidental thereto, such as for the site of the homestead or the dwelling-house of the mali."—(Kalee Kishen *v.* Sreemati Janki, 8 W. R., 251). Similarly no right of occupancy is acquired in land used for the erection of a school or a church.—(Ranee Shornomayi *v.* Blumhardt, 9 W. R., 552.) Occupancy right will not accrue in any land, except land of which the main object was cultivation.—(Ram Dhun *v.* Haradhun Paramanik 12 W. R., 404; Khellut Chunder *v.* Umirto, 1 Indian Jurist, N. S., 426). Land situated in a town, or used for building purposes, and not for horticultural or agricultural purposes, are not the subject of the legislation of Act X of 1859, and therefore no right of occupancy can be acquired under this section in such holding. In the matter of Bromo Mayi, 14 W. R., 252; Madan Mohan Biswas *v.* Stalkart, 17 W.R., 441; Kalee Mohan *v.* Kalee Kristo, 11 W.R. 183; Church *v.* Ram Tanoo Shaha, 11 W. R., 547; Rani Doorga Sundari *v.* Oomdutunnesa, 18 W. R., F. B., 235. *Per contra,* Brojonath *v.* Gopeenath Shaha, 17 W. R., 183; Watson & Co. *v.* Gobinda Chunder, Sp. W. R., Act X, 46; Sheik Nasar Ali *v.* Sadut Ali, *id.*, 102; Biprodas De *v.* Wollen, 1. W. R., 223; Tarini Persad Ghose *v.* Bengal I. Company, 2 W. R., Act X, 9; Mothoora Nath *v.* Campbell, 15 W. R., 463. The Full Bench decision in Rani Doorga Sundari settled the point. The present section is more clear. It will evidently exclude land entirely for buildings from the right of occupancy.—(Mohurali Khan *v.* Ram Ruttun, 21 W. R., 460.) A landlord, however, who allows his tenant to invest capital in erecting buildings on land let for cultivation, and raises no objection for a considerable number of years, will not be allowed to disturb the holding. The fact of the building having been allowed to remain is *primâ facie* proof that the land was let for building purposes.—(Brojonath *v.* Stewart, 16 W. R., 216). But *bastu* land upon which the raiyat's house is built does not fall within the definition of land let for building purposes.—(Naimuddi Jowardar *v.* Scott Moncrieff, 12 W. R., 140; W. G. N. Pogose *v.* Raju Dhopee, 22 W. R., 511.)

Julkur and tank.

There can be no right of occupancy in anything but land; a raiyat who has held a julkur for a number of years obtains no right of occupancy in it.—Wooma Kanto *v.* Gopal Sing, 2 W. R., Act X, 19; Sham Narain *v.* Court of Wards, 23 W. R., 432; Jagabandhu *v.* Promotho, I. L. R., 4 Cal. 767; Ballin Kar *v.* Akram, I. L. R., 4 Cal. 961. So that when the julkur dries up, the land below does not, as a matter of course, become the right of the holder of the julkur.—Bishenlal Das *v.* Rani Khyrunnesa Begum, 1. W. R., 78. A right of occupancy cannot be gained in respect of a tank used only for the preservation and rearing of fish, and not forming part of any grant of land or an appurtenance to any land, even though possession may have been held for more than twelve years.—Siboo Jelya *v.* Gopal Chunder, 19 W. R., 200. "No doubt," observed in this case, Couch, C. J., "it may be said that a tank comes under the word land, as land covered with water, but it is to be land cultivated or held and we think, in considering whether this tank comes within the provisions of Act X of 1859, we must do what was done in Ranee Doorga Sundari *v.* Oomdutunnesa, 9 B. L. R., 101, *i.e.*, we must look at all the provisions of the Act. Following that rule in the present case we think we cannot say that the provisions of Act X of 1859

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are applicable to such a tank as this is. For instance, the provision in section 112 of the Act, which was noticed in that case, respecting the recovery of the rent of the land by distress, is not applicable to such a tank as this. Following that rule we are of opinion that it cannot be said that a right of occupancy was gained under the Act by the parties in possession of this tank, although for more than twelve years." A right of occupancy in land includes the same right in respect of a tank appurtenant to the land. But a right of occupancy can be acquired in a tank with only so much land as is necessary for the banks—(Nidhi Krishna *v.* Ram Doss Sen, 20 W. R. 341.) "Where land is let for cultivation, and there is a tank upon it, the tank would go with the land, and if there was a right of occupancy in the land, there would be a right of occupancy in the tank as appurtenant to the land. But here the tank is the principal subject of the lease, and only so much land passed with the tank, as is necessary for it, namely, for banks. This in reality is the tank, and according to the decisions there cannot be a right of occupancy acquired in it." (Per Couch, C. J.). So where a jotedar had exercised rights of fishery over two julkurs for more than twelve years not as the owner of jote (with which the julkurs were not connected), but as a tenant under a landlord, it was held that such possession did not confer upon him a right of occupancy—(Shyam Narain *v.* The Court of Wards on behalf of Rajah of Durbhanga, minor, 23 W. R. 432.) But apart from the special provisions of Act X of 1859 as to rights of occupancy, applying the maxim of *optimus interpres rerum usus*, it may be shown by evidence as to the nature of the enjoyment of any immovable property what the grant in its origin really was. Accordingly, the frequent transfer of an interest in a tank without any change in the terms in the holding or in the amount of rent paid, extending over more than sixty years, was held to prove that the interest was a permanent and transferable one, which could be maintained against the proprietor of the taluk in which the tank was situate—Nidhi Krista *v.* Nistarini Dasi and others, 21 W. R., 386.)

'Village' has been defined in clause (10) of section 3. This is an attempt to rehabilitate the *khudkasht* raiyat and disturb the economy of the peasantry as has grown up since 1859. The original division of raiyats was *khudkashts*, or those who cultivated the lands of the village in which they resided, and *paikashts*, or those who cultivated in the neighbouring village. The former had occupancy right, the latter were mere tenants-at-will. When Act X of 1859 was enacted, the village community was not in existence in Bengal, and Act X did away with the element of residence in the village, and adopted a prescriptive test of occupancy, *viz.*, twelve years' occupation, whether in the village or out of it. The present Act keeps the prescriptive test introduced by Act X intact, and further circumscribes the rights of the settled raiyat in the village. The element of residence in the village has been thrown out in both the Acts. As to village, see notes under sub-section (2) of this section and also notes under clause 10 of section (3).

Whether under a lease or otherwise :—This is consistent with the case-law on the subject. Originally it was held that a raiyat who holds for more than twelve years under pottas granted only for

Lease

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terms of years, has no right of occupancy—(Kebul Mahtun *v.* Sheik Sunnoo, 5 W. R., (Act X), 80 ; Domunoollash Sircar *v.* Mahmondie Nushyo, 11 W. R., 556.) These decisions have been overruled by a Full Bench. A raiyat who has held or cultivated a piece of land continuously for more than twelve years, but under several written leases or pottas, each for a specific term of years, is entitled to claim a right of occupancy in that land. Neither the mere fact of a raiyat taking a lease for a term of years, nor the mere existence of the right of re-entry on the part of the landlord, amounts to an express stipulation within the meaning of section 5. Act X of 1859, so as to prevent the right of occupancy being acquired under section 6—(Pandit Sheo Prokash *v.* Ram Sahai Sing, 17 W. R., 62 F. B.) In support of this, Baboo Nundo Lall See *v.* Ramun Sing, 6 W. R., (Act X) 38 ; Shibdyal Palit, 2 W. R. (Act X) 54 ; 4 W. R., (Act X) 1 ; Khujoorannesa Begum *v.* Ahmed Reza, 11 W. R., 88 ; see also Golam Panjah *v.* Hurish Chandra, 17 W. R., 552 ; Narain Sing *v.* Mansur Raoot, 25 W. R. 155., Where a lease provided that at the expiration of the term, the landlord should be at liberty to enter into a settlement with any one he pleased, and so put an end to the lessee's tenure, and the landlord notwithstanding allowed the tenant to continue the occupation paying rent,—*held*, that there was nothing in the stipulation which of itself operated to negative or destroy the tenant's right of occupancy—25 W. R., 114) The prohibitory clause of section 6, Act VIII of 1869 (B. C.) will not apply to the case of a raiyat holding under a person having a permanent transferable interest in the land, so as to deprive the raiyat of a right of occupancy in the land if he has fulfilled the other requirements of the law. The mere fact of his holding under a potta, which reserved only an annual rent year by year would not be sufficient to deprive him of the privilege, unless there were some words in the potta prohibiting him from acquiring that right—(Raghunath Soner *v.* Mookund Das, 35 W. R., 213.)

The mere fact of a lease being granted for a particular term, even where there is an express provision for re-entry by the lessor, does not prevent the accrual of an occupancy right under section 6, Act VIII of 1869 (B. C.), to a raiyat who continuously occupies for more than twelve years : nor is a right of occupancy already acquired destroyed by a grant of such a lease—(Mukhtar Bahadur *v.* Brojoraj Sing Chowdry, 9 C. L. R. 143 ; Chundrabali *v.* Harrington, I.L.R., 18 Cal 349. see s. 116 and Chap. XI post.

The present Act goes further than these decisions, because even a contract cannot prevent the accrual of an occupancy right. *Vide* (*a*) sub-section (3) of section 178.

Proprietor's private lands :—For Nij-Jote, *Khamar, Khamat* and other private lands of the proprietor, see s. 116 and chap. XI post.

Chur, Deerah and utbandi lands :—See s. 180 *post.*

Service tenures :—See s. 181 *post.*

Distinction between a settled raiyat and occupancy raiyat :—Having regard to the definition of the settled raiyat as given in s. 20 and to the classification of raiyats as provided for in s. 4, the Legislature evidently meant to

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create no distinction between an occupancy raiyat and settled raiyat, but a distinction has been attempted to be made in Kuldip Sing *v.* Chatur Sing, 2 C. W. N., cccii. It is said that every settled *raiyat* has occupancy-rights; but every *raiyat* having rights of occupancy need not necessarily be a settled *raiyat* of the village where his holding is situate. An occupancy-right may be acquired by purchase in a transferable occupancy holding, but the status of a settled *raiyat* in village can only be acquired by holding some land as a *raiyat* in the village for twelve years.

Sub-section 2:—"The first alteration in this chapter which appears to call for notice has reference to the area over which the status of a settled raiyat is to hold good. In the 11th paragraph of our first report we referred to the inconvenience which might arise in certain exceptionally large estates from the status holding good over the whole estate, and this has given rise to considerable discussion. The Bengal Government, in the 22nd paragraph of its report of the 15th September 1884, stated that 'the majority of the officers consulted disapproved of the definition of 'settled raiyat' as given in the Bill,' and that 'the proposal which found favour was the elimination of the word 'estate' from the definition.' That Government, nevertheless, was of opinion that it was necessary to retain the word 'estate' in order to meet the danger of the acquisition of the occupancy right being prevented by shifting raiyats from one village to another within the estate. It seemed to us that this danger was not so great as to justify the extension over all portions of an estate of the status of "settled raiyat" acquired in one portion of it, since estates are frequently divided among numerous tenure-holders, who would have no opportunity of examining each other's books, or knowing anything about each other's raiyats. The danger in either direction is not serious, for in the vast majority of cases the raiyat is practically tied to his own village; and we felt, moreover, that by confining the status to the village we should be proceeding in closer conformity to the original conception of a *khudkasht* raiyat, which, as explained in the Statement of Objects and Reasons of the Bill, it has been always intended to keep in view." (S. C. B. III.)

Referring to the argument of the Lieutenant-Governor about the propriety of retaining the word 'estate' in this section, the Hon'ble Sir Steuart Bayley observed in his speech in the Council: "An 'estate' is, so far as this argument is concerned, an administrative fiction. It is simply the area registered in our books under one number, and liable to be sold as a single unit in case of arrears of revenue being unpaid. For rent purposes it has no meaning. It is not all the area owned by a landlord, for a landlord may have many estates. It is not the possession of a single landlord, for it may be divided among numerous shareholders. It may be part of a village, or it may be hundred villages. It may be the property of one man, or the property of hundred men. It may be managed direct by the landlord or indirectly by a number of agents, or it may, as in the case of the Burdwan Raja's estates, be let out into innumerable *patni* or permanent tenures (these tenure-holders subdividing it again), and in these circumstances what is one estate in the Collector's books becomes, for rent purposes several hundred different estates, the immediate owners or managers of which have no concern with one another, can see nothing of each other's books, and know nothing of each other's

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raiyats. The Burdwan estate is of course an exceptional instance from its size, but to a smaller extent the same thing happens all over the country, and it is on this point that the objection is most difficult to meet. The affect would be to say that a man having once acquired occupancy rights in any part of an estate should retain those rights with respect to any land which he may in any way acquire in any other part of the estate. Now, an estate, as I have shown, may be, and frequently is, subdivided among numerous tenure-holders, or numerous managers. Any of these men may perhaps be able to say if any particular person has settled rights in his own particular tenure, but he cannot possibly know this in regard to the other tenures of the estate. He may let a man into his village as a non-occupancy-raiyat, and the latter can immediately turn round and say that having acquired occupancy rights in a village twenty miles away belonging to another tenure-holder, he claims to have them also in his new land. Clearly the Lieutenant-Governor's argument, deduced from the landlord's ability to know the character of his own raiyats, does not apply to cases of this class, and from this point of view his position is not an easy one to defend. The only reason for retaining the word 'estate' in the definition is to prevent a landlord from shifting his raiyat's holding from one village to another within his estate and so breaking down the occupancy-right. Now to this argument the Lieutenant-Governor himself supplies the answer. He urges that 95 per cent. of the raiyats are so poor that they cannot hold land away from their own residence. This, if it shows that the danger to the landlord would not be great from retaining the word 'estate,' it also shows that the possibility of shifting raiyats, except within reach of their residence, is equally limited. The advantage to the raiyats of carrying with them the occupancy right from one village to another, within the same estate, is very small, for it is shown that 95 per cent. of them are not in a position to take advantage of it, and the only raiyats who could take advantage of it are those who have abandoned their own village, and its application in their case would be a misuse of the power and contrary to the proposed intention of the Bill. It is possible, no doubt, that shifting may occur in exceptional instances, where a landlord has several villages in his own direct management within reach of the cultivator's residence, and where he is powerful enough. But in the case of a very powerful landlord, strong enough to do this and determined to break down the occupancy-right, I am afraid he will always find some door open, and it must be remembered that not only is the number of landlords who are in a position to do this very small, but also the number of tenants to whom the process can be applied is small also. I suppose that, when the Bill becomes law, nine-tenths of the tenants will have secure occupancy rights in the land they cultivate, and of the remaining tenth it is but an infinitesimal portion that can be exposed to the danger above explained. On the other hand, as long as we confine the accrual of occupancy-rights to the village, we have an absolutely unassailable position. The *khudkasht* raiyat's rights in the village are independent of those of the rent-receiver, and it matters not among how many estates the village may be divided. The raiyat is a *khudkasht* raiyat of that village, and has by custom, as well as by old law, a right of occupancy in any land he may cultivate in that village without reference to whom he pays his rent; but

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when once with the object of stopping gaps we take up more ground and apply the same rule to the estate, our position is no longer defensible. Not only is the theory new and unsupported by prescription or sentiment, it is open to a variety of practical objections, and by taking extreme instances it can be made to appear hopelessly ridiculous. Looking as I do, upon the danger involved to the raiyats on the one hand, by omitting 'estate' and to the zemindars on the other, by including it as for the most part of exceedingly small importance, I greatly prefer, for the above reasons, to omit it. I do not think any intermediate device, such as that of limiting the 'estate' to so much of it as is comprised in one pergunnah, or in one permanent tenure, or by extending the village to an artificial area within a fixed radius, would be found to work satisfactorily, and none of these suggestions wholly commend themselves to the Committee. I can only repeat my conviction that, though the danger of raiyats being shifted from one village to another within an estate is not wholly imaginary, it is not a serious danger, and that the provisions in the Bill, supplemented as they are by a working presumption, will sufficiently secure nine-tenths of the riyats in their just right." (*Debate of the Council.*)

But the holding of different times must be under one and the same landlord. It was never the intention of the Legislature to allow the raiyats of rival zemindars to take advantage of this section and make out a right of occupancy for themselves. The language of the section is, however, defective.

Sub-section 3:—This provision only refers to the acquisition of the right, and the right when acquired is declared to be heritable in section 26—see Nimchand Borooah *v.* Mooraree Mundal, 8 W.R., 127. In an earlier decision it was held that where the zemindar consents to the transfer of a tenure from one raiyat to another, the possession of both must be considered continuous, and the right of occupancy will date from the time of the first holder—(Huro Chunder *v.* Mr. A. D. Dunn, manager of the Estates of Lukhee Debia Chowdrain, 5 W. R. Act X, 55); but not so, unless the holding is transferable by custom—(Messrs. Watson & Co. *v.* Ranee Sharat Sundari Debia, 7 W. R., 395). When a jote is transferred even with the consent of the zemindars, the transferee merely acquires a new jote on the terms on which the old tenure was held, but he is not entitled to make up his right of occupancy by adding the time during which his predecessor held it—(Tara Prosad *v.* Soorja Kant 15 W. R., 152; Hyder Bux *v.* Bhubendra Deb, 17 W. R., 179; also 22 W. R., 22 F. B.) From this clause it appears that the holding of a non-occupancy raiyat is heritable, or else, the word "heir" would not have been used. But it has been held that the holding of a non-occupancy raiyat is not heritable.—Karim *v.* Sunder, 1 C. W. N. 89; I. L. R., 24 Cal. 707. This sub-section only shews that where the heir of a non-occupancy raiyat is allowed to hold on, he may add the period of his own occupation to that of his predecessor to make up the period of 12 years necessary for the acquisition of the right of occupancy; but the provision is expressly said to be limited to the purpose of s. 20, and it does not shew that he can compel the landlord to give up possession after re-entry on the late tenant's death. *per* Banerjee J. *Ibid.*

whose heir he is

But the possession of a stranger will not count in making out an occupancy-right.

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An heir of an occupancy raiyat can claim recognition by the landlord on the death of his ancestor who was the recorded tenant (Ananda Kumar *v.* Hari Das, I. L. R., 27 Cal., 545 ; 4 C. W. N., 608.

Sub-section 4 :—This supersedes Shaik Mahommed Chaman *v.* Ram Persad Bhakat , 8 B. L. R., 338 ; 22 W. R., 52 note. This right may be in its inception joint with other persons, and by the death of co-sharers ultimately became a sole right without its continuous nature being affected.—(A. J. Forbes *v.* Ramlal Biswas, 22 W. R., 51.) see notes, pp. 96, 97, *ante.*

Sub-section 5 :—This sub-section will extend the range of s. 21.

And for one year thereafter, *i. e.*, for one year after he ceases to hold any land in the village. The holding of *any* land, however, *e. g.*, a homestead, would not make a person a settled raiyat. The holding must be as a raiyat, *i. e.*. for the purposes of cultivation. Suppose a man used to cultivate some land in a village and reside there, and suppose he throws up all his land except his homestead and does not take up any fresh land for cultivation within a year, does he still continue to be a settled raiyat ? Possibly not. See s. 87, *post.*

Sub-section 6 :—in a suit by a zemindar for ejectment where the raiyat pleads a continuous occupancy for twelve years, and it is found that the raiyat was evicted during that period but got back into possession ; if the eviction were wrongful, it would not be such an interruption of possession as would prevent the raiyat from acquiring a right of occupancy. But it would lie with the raiyat to show that the eviction was wrongful.—Mahomed Gazee Chowdry *v.* Noor Mahomed 24 W. R., 324. See also Lutifunnissa *v.* Pulin Bihari Sen, W. R. Sp. No., F. B., 91 and Radha Govind Koer *v.* Rakhal Das Mukerji, I. L. R., 12 Cal,, 82.

Sub-section 7 :—This sub-section, which makes a very important change in the law, has been adopted at the instance of the Government of Bengal ; "While, however, the Lieutenant-Governor thus agrees with one part of the definition of a settled raiyat the burden of proving twelve years' occupation. This provision will in most cases cause delay and inconvenience, and in some cases must result in injustice. It is here a misfortune that Bengal is so absolutely destitute of a record of rights. If we had such a record, the position would be without difficulties, but in its absence there is much reason to fear continuous litigation to establish or disprove claims to a right of occupancy. When under the provisions of this bill a record of rights is established, disputes will be impossible. But in the long interval before that can be accomplished, we must seek by some addition to the section to meet the difficulty, and the only way which presents itself to the Lieutenant-Governor's mind is the adoption of the principle that the fact of residence or actual occupation which can be readily ascertained, should afford a rebuttable presumption that the raiyat is entitled to be classed as a settled raiyat. If the presumption be unfounded, the zemindar can readily rebut it, for all the materials of proof are in his office or *sherista.* No one can doubt that in the vast majority of cases the presumption will not be rebuttable, and that the zemindars will not question it ; and thus an enquiry into

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exceptional cases will alone be needed to secure to the country at large the peace and contenment which must attend on the well-defined *status* of the bulk of the agricultural population. On the other hand, an enquiry into the *status* of all resident cultivators will last a generation and will lead to unrest, if not litigation, which should be avoided."—(No. 72 T.—R. of the 27th September 1883.)

This provision is, however, revolutionary. Hitherto it has been always held that it is for the raiyat to prove that he has acquired an occupancy right; the presumption now lays down that the zemindar is to prove that he is not an occupancy-raiyat. The presumption, however, is rebuttable. Observe, too, that it applies with reference to some particular land. Suppose the question arises with respect to a particular plot of ground, and the holder proves that he holds it as a raiyat, the presumption will arise that he has acquired a right of occupancy with reference to that particular plot. The zemindar may rebut it; and then the raiyat may fall back upon sub-section (2) and prove that, though he did not hold that particular plot of land for twelve years, he has held other lands for that period.

Presumption.

21. (1) Every person who is a settled raiyat of a village within the meaning of the last foregoing section shall have a right of occupancy in all land for the time being held by him as a raiyat in that village.

Settled raiyats to have occupancy-rights.

(2) Every person who, being a settled raiyat of a village within the meaning of the last foregoing section, held land as a raiyat in that village at any time between the second day of March, 1883, and the commencement of this Act, shall be deemed to have acquired a right of occupancy in that land under the law then in force; but nothing in this sub-section shall affect any decree or order passed by a Court before the commencement of this Act.

Sub-section 1:—"One of the privileges of the *khudkasht* raiyat was to hold fresh land in the same village on the same tenure as the old; and as, in those times there was a larger margin of waste in all villages, the resident cultivator had the fresh land at his door. There is now but little margin of waste in any village of the settled districts, and therefore the raiyat if he wants to add to his holding, cannot always succeed in doing so. That he should, however, if successful in his quest, (and he can only succeed with the consent of his landlord) hold such additional land in the same estate, by the same title as his original holding, is only a rational development of an old customary law of the country to suit the modern wants." (Beng. Govt. No. 972 T—R., of the 27th September 1883.)

The force of this sub-section has been amplified by sub-section (5) of section 20. A settled raiyat acquires a plot of ground in 1884; by this sub-section he acquires a

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right of occupancy in it. In 1885 he surrenders all his land except the plot he acquired in 1884; under sub-section (5) of section 20 he continues to be a settled raiyat for that plot. In 1886 he acquires another piece of land under the landlord, and under this sub-section he again acquires a right of occupancy in it.

This sub-section will have a retrospective effect between March 1883 to 1st November 1885 under the following sub-section. It supersedes the decision of Amarchand Bukshee Pyekar, 22 W. R., 228, which laid down that land held as one tenure is either subject to a right of occupancy as a whole, or it is not subject to any right of occupancy as to any part of it; if within twelve years the tenant has been allowed to take possession of fresh lands, and such addition was intended to create a fresh tenure, a right of occupancy has not been acquired as regards the whole, although a portion has been held for more than twelve years. The use of the word "village" in this section shows that no right of occupancy can be acquired under the Act in towns and suburban lands, and it has been held that "there is no authority for the proposition that there may be rights of occupancy in suburban lands let for purposes of building, though these rights may not be cognizable under a law intended only for agricultural landlords and tenants."—(Rakhaldas Addi *v.* Dinomayi Debi, I. L. R., 16 Cal., 652). A raiyat who has a right of occupancy has the same right in land accreted to his *jote* as he has in his *jote*.—Gaur Hari *v.* Bhola Kaibartto, I. L. R., 21 Cal., 233.

Sub-section 2:—This section has a retrospective operation and should be read with s. 178 *post*. "The first part of the section deals with the case of lands held by a settled raiyat at or after the date from which the Act speaks, that is to say, the date at which it came into operation, and it declares that such holding shall give a right of occupancy. Sub-sec. 2 deals with the case of lands held by a settled raiyat at an early period, namely, between the 2nd of March 1883 and the commencement of the Act, and it says that such holding shall be deemed to have given a right of occupancy. This sub-section is therefore in express terms retrospective." Per Wilson, J. (Pigot, O'Kinealy and Ghose JJ., concurring).—Tupsee Singh *v.* Ram Sarun, I.L.R., 15 Cal. 376; see also Jogessur Dass *v.* Aisani, I.L.R., 14 Cal. 553; followed in Parbati churan *v.* Kamaruddin, I.L.R. 14 Cal 556 note.

The 2nd of March 1883 was the date on which the motion was made in the Legislative Council for leave to introduce The Bengal Tenancy Bill.

Effect of acquisition of occupancy-right by landlord.

22. (1) When the immediate landlord of an occupancy-holding is a proprietor or permanent tenure-holder, and the entire interests of the landlord and the raiyat in the holding become united in the same person by transfer, succession or otherwise, the occupancy-right shall cease to exist; but nothing in this sub-section shall prejudicially affect the rights of any third person.

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(2) If the occupancy-right in land is transferred to a person jointly interested in the land as proprietor or permanent tenure-holder, it shall cease to exist; but nothing in this sub-section shall prejudicially affect the rights of any third person.

(3) A person holding land as an *ijaradar* or farmer of rents shall not, while so holding, acquire a right of occupancy in any land comprised in his *ijara* or farm.

Explanation.—A person having a right of occupancy in land does not lose it by subsequently becoming jointly interested in the land as proprietor or permanent tenure-holder, or by subsequently holding the land in *ijara* or farm.

Sub-sections (1) and (2):—These sub-sections introduce the rule of merger: "We have in s. 22 recast ss. 28 and 29 of the Bill No. II so as to carry out more precisely the intention with which they were framed, and we have inserted a sub-section (2) providing that if the occupancy right in land is transferred to a person jointly interested in the land as proprietor or permanent tenure-holder, it shall cease to exist."—(S. C. B. III.)

The original provisions about merger as proposed in the Rent Commission Bill may throw some light upon the subject. They are as follows:—

"43. (*a.*) When by purchase at a private or public sale, by gift, succession, or will, the proprietor of an estate becomes the owner of a tenure in such estate, such tenure shall, unless such proprietor can show that he had a contrary intention, be presumed to be merged in the proprietary interest and to be extinguished by the fact of the same person being owner of the estate and the tenure, subject, however, to the following conditions:—

Nemo potest esse dominus et tenens.

(1) Such person must be owner of the estate and the tenure in the same right and at the same time.—Kent, Vol. IV, p. 108; Woodfall, 281.

(2) The presumption shall not arise in the case of a minor until he becomes of full age, or in the case of a person of unsound mind until he becomes of sound mind.—Kent, Vol. IV, p. 112.

(3) Such merger shall not operate to the prejudice of any person having a lien upon such tenure or any under-tenure-holder or raiyat.—Kent, Vol. IV, pp. 110 and 111; 13 B. L. R., 198.

(4) Subject to the provisions of the law for the time being in force relating to sales of land for arrears of Government revenue, and subject to the provisions of this Act as to sales for arrears of rent without, or in execution of, a decree, such proprietor shall have the same rights and be subject to the same liabilities which the previous holder of such tenure had or was subject to, in respect of those persons between whom and such tenure-holder the relation of landlord and tenant existed—8 and 9 Vic., cap. 106, section 9:

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provided that when, in the case of two or more persons being coparceners, one or more, but not all, of such persons become the owners of a tenure in such estate, no merger shall take place.

"(*b*.) Upon the expiry of three months from the date when such person so became owner of the estate and the tenure, such contrary intention may be proved in the following manner and not otherwise; that is to say, by the production of a deed declaratory of such intention and duly registered within such period of three months, and by proof that a copy of such deed was published in the manner provided in sub-clauses (4)and (5) of clause (*a*) of section 203, for the notification therein mentioned.

"44. The provisions of section 43, so far as they are applicable, shall apply, *mutatis mutandis*, to a tenure- holder acquiring an under tenure of the first degree; to an under-tenure-holder of the first degree acquiring an under-tenure of the second degree; and so on in order; and also to a proprietor, tenure-holder or under-tenure-holder acquiring an occupancy-holding, the rent of which was previously payable directly to such proprietor, tenure-holder, or under-tenure-holder.

"45. It is hereby declared to be, and to have always been, the law in the territories under the administration of the Lieutenant Governor of Bengal that, when the Secretary of State for India in Council acquires an estate by purchase or otherwise, the proprietary interest in the land included in such estate is merged in the paramount title of such Secretary of State, and extinguished by the fact of such proprietary interest and such paramount title meeting in the same person. The third and fourth conditions mentioned in clause (*a*) of section 43 shall apply to every such estate acquired by the Secretary of State for India in Council. Nothing contained in this section shall be construed to interfere with the operation in any such estate of Act VIII of 1879 passed by the Lieutenant-Governor of Bengal in Council, or of any Act for the time being in force for the recovery of public demands.

Illustrations.

An estate named Sultanpur is purchased by the Collector of Burdwan on behalf of the Secretary of State for India in Council at a sale for arrears of land revenue. A, B, and C are raiyats holding land included in this estate, and before the sale they paid certain annual sums as rent direct to the proprietor of Sultanpur. After the sale they are liable to pay the same annual sums to the Secretary of State for India in Council, and such sums are so payable not as rent, but as land revenue."

The section as it now stands was recast after several changes in the successive Bills. The effect of the provisions in this sections may be summed up as follows:—

1. If the immediate landlord, being the sole proprietor or the sole permanent tenure-holder acquires a right of occupancy by transfer, succession or otherwise, a merger takes place and the occupancy right is extinguished.

2. If the immediate landlord, being a fractional proprietor or permanent tenure-holder, acquires a right of occupancy by *transfer*, a merger takes place, and the occupancy right is extinguished.

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3. If the immediate landlord, being a fractional proprietor or permanent tenure-holder, acquires an occupancy right by succession or otherwise than *transfer*, there is no merger, and the occupancy right lives.

4. If an occupancy-raiyat acquires the entire interest of the immediate landlord or permanent tenure-holder, there is a merger and the occupancy right is extinguished.

5. If an occupancy-raiyat acquires only a share of the immediate landlord's interest, he being neither a proprietor nor permanent tenure-holder, no merger takes place, and the right of occupancy lives.

6. If the superior and inferior interests unite together, when the superior interest is that of a person who is not a permanent tenure-holder, or who is a farmer or ijaradar, no merger takes place, and the two rights live distinctly apart from each other, no matter how the union took place.

7. During the term of an ijara or farm, the raiyati right, whether an inchoate occupancy right or a complete right of occupancy, remains in abeyance.

Sub-sections (1) and (2):—*Merger.* The words "rights of any third person" mean rights which are valid; so a landlord purchasing the holding of a raiyat in execution of a decree for arrears of rent is entitled to take *khas* possession by ejecting an under-raiyat whose lease is not created by a registered instrument as provided in s. 85; the rights under such an under-raiyati lease are not protected by sub-sec. 1—Rajah Peary Mohun *v.* Badul Chandra, 5 C. W. N. 310; I.L.R., 28 Cal. 207. The 'third person' includes every person interested other than the transferrer and the transferee:—Sitanath *v.* Pelaram, 21 Cal. 869.

Rights of any third person.

A right of occupancy must be acquired against somebody and if a raiyat is in possession of the land in a double capacity both, as a raiyat and as a malik, it is almost impossible to conceive how he can under these circumstances acquire a right of occupancy aginst himself.—Lal Bahadur *v.* Solano, I. L. R. 10 Cal. 45; 12 C. L. R. 559. The right of occupancy is a right given to a raiyat continuing only so long as the raiyat pays rent for the land he holds, and though it cannot be affected by a wrongful eviction, still when the zemindar acquires the land by purchase and takes possession, even in the *benami* name of a third party, seeing that he cannot pay rent to himself, the right is gone and cannot subsequently be revived Radha Govind *v.* Rakhal Das, I. L. R., 12 Cal. 82.

Right of occupancy acquired by landlord.

A tenant, who had commenced, to occupy his holding on the 13th April 1871, acquired by purchase in the year 1878 a fractional share of the proprietary interest, and continued to occupy the holding as raiyat till the 13th May 1885, when he was dispossessed. On the 30th March 1886, he instituted a suit to recover possession, alleging that he had acquired a right of occupancy. It was contended that, owing to the purchase of the share of the proprietary interest he could not have acquired such right: *held*, that under Bengal Act VIII of 1869 there was nothing to prevent such right being acquired by the plaintiff if after his purchase he continued to hold the land as a raiyat, and if the relation of landlord

By a co-sharer landlord.

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and tenant existed between himself on the one hand and the proprietors on the other, and if the period for which he so held extended for twelve years from the date of the commencement of his holding.—Gur Buksh Roy *alias* Gur Buksh Sing *v.* Jeolal Roy, I. L. R., 16 Cal., 127. The acquisition of an occupancy right by a proprietor does not, under sub-section (2) of s. 22 of the Bengal Tenancy Act, affect the right of a co-sharer landlord to receive his share of the rent of the tenancy. The "third person" mentioned in that sub-section includes every person interested other than the transferrer and transferee.—(Sitanath Panda *v.* Pelaram Tripati, I.L.R., 21 Cal., 869. There is no law in this country which prevents one of several co-proprietors holding the status of a tenant under the other co-proprietors of land which appertains to the common estate, and when a co-sharer landlord purchases an occupancy holding, the holding does not cease to exist, but the occupancy right and the holding continues divested of the right of occupancy which attached to it.—Jawadul Huq *v.* Ram Das Shaha, 1 C. W.N. 166: I. L. R., 24 Cal. 143. In the same way, the effect of a purchase of an entire occupancy holding by the landlords is not necessarily to put an end to the holding but to divest it in their hands of the right of occupancy, if any, which is attached to it.—Meajan *v.* Minnat Ali, I. L. R., 24 Cal. 521. When the landlord sells the occupancy holding in execution of a decree for money and purchases it himself, it cannot be said that the holding without the right of occupancy continues to exist, so as to entitle the landlord to put the holding again to sale in execution of a decree for arrears of rent.—Ram Saran *v.* Mahomed, 3 C. W. N. 62. Although under the provisions of this section an occupancy right may be severable from the tenancy right, it is only severable in cases to which this section applies and not in all cases. In the case of a non-transferable occupancy holding, the holding cannot be sold without the right of occupancy so as to give the transferee a right to retain possession thereof, so where at the instance of some of several joint-landlords a non-transferable occupancy holding was sold and purchased by them and the holding was in their possession the tenant having left the land: *Held* the other co-sharers were entitled to get a decree for joint possession.—Girish Chandra *v.* Kedar Chandra, 4 C. W. N. 569: I. L. R., 27 Cal. 473. See also Delbas Sardar *v.* Husan Ali, I. L. R., 26 Cal. 553 A raiyati interest in respect of the whole of the land comprised in the holding is not extinguished by the raiyat's purchase of a fractional share of the zemindari:—Gur Buksh *v.* Jeolal, I.L.R., 16 Cal, 127; see also Jardine Skinner & Co. *v.* Sarat Soundari, 5 I. A. 164: 3 C. L. R., 140.

Sale in execution of a decree for rent.

Occupancy right, when severable.

Raiyat's purchase of a fractional share of zemindari.

Sub-section 3:—A person held raiyati lands alternately as cultivator and ticca lessee or farmer continuously for a period of about fifty years. In special appeal it was urged that when the defendant took the lease, his possession as cultivator merged in that of the higher title, and that, though he had cultivated the lands for broken periods, yet that would give him no right of occupancy, as he had not held the lands continuously as a cultivator for a period of twelve years. "We think," says Loch, J.,

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in this case, "the doctrine of merger does not apply to this case, for the defendant, notwithstanding the leases, continued to hold the lands, as he always had done previously, viz., as a cultivator. We do not mean to say that the defendant as lessee could confirm his own right of occupancy. But we think that, during the period of the lease, the power of eviction as regards him was in suspense, and when the lease expired, he was still, as he had always been, the actual cultivator." Ainslie, J., observes: "The lands in the present case are raiyati lands. They were subject to the accrual of some right in the raiyat other than that derived from express grant by his landlord; and it seems to me that such rights do not merge in the ticca leases taken from the zemindar. It has been nowhere proved that in the intervals between the ticca leases, the defendant entered into possession under a new arrangement with the zemindar. He appears to have continued in possession as a matter of course, and on the expiry of each ticca lease to have resumed without any question the position he was holding at the commencement. No doubt the defendant as farmer could not, by his own neglect to exercise the powers of the landlord, create for himself any title as raiyat against the zemindar. But on the other hand he lost no title or interest that he had as a raiyat. If his raiyati interest be taken as suspended during the whole period of the existence of the leases, we still find that he has been holding for period of 21 years, and that in the whole term of 47 years, commencing in 1231 F. S., his occupation has never been interrupted by the holding of any other raiyat"—(Mokoondi Lal Dobe *v.* L. G. Crowdy, 17 W. R., 274.) In Thomas Savi *v.* Panchanan Roy and others, 25 W. R., 503, the lower Courts found as a fact that the defendant's tenancy commenced in 1269, and that from 1272 to 1278 he was assignee of the landlord's interest under an ijara lease for six years. At the end of 1278 he did not quietly surrender the leased property as stipulated, and consequently a notice to quit was served upon him in 1279. The Court (Ainslie and Birch, JJ.) observed: "It seems to us that the defendant must be taken to have been holding over as farmer for this last year, so that he was in fact assignee of the landlord's interest up to the end of Assin 1279. He was therefore the person who had the power to terminate the raiyat holding by virtue of which he now claims, and so long as he remained as middleman, the landlord could not come in to deal directly with the raiyats. It is through his own forbearance that the present claim has grown up, and there can be no equity in allowing him to stand by idle in order to create a right in himself adverse to his landlord whose interest he as farmer was bound to protect. Granting that a raiyati interest may consist with a farming title, I think it must be held that the co-existing raiyati interest is the same in extent and quality at the end as at the beginning of the lease of the farm. Whatever may be the case as to other tenants as against the farmer himself, the lessor has a clear right to have compensation for any change to his prejudice caused by him (the farmer), and this not merely by way of damges, but by having the property restored to its original estate where this is practicable. Thus if the defendant had no right of occupancy at the commencement of his farming lease, he cannot have acquired one during its currency. This view of the law was taken by Mr, Justice Loch and myself in the case of Mookundilal

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Dobe *v.* Crowdy, 8 B. L. R., App. 95. This view may lead to some difficult questions, but their solution is unnecessary in the present case, for it is only by continuing the raiyati interest to the very last day on which the farming title continued to exist that an occupation of twelve years is made out. Baboo Mohini Mohan Roy contended that under section 6, Act VIII of 1869 (B. C.), the right of occupancy is not limited by any proviso, save that mentioned in section 7, but that it comes into effect absolutely the moment 12 years' continuous possession as a raiyat has been completed. But then the question is, what is meant by occupation as a raiyat? I, in effect, held in the case cited, and still hold, that it means an occupation which, though subordinate, is in a sense adverse to the landl o rd so far as it qualified his power of dealing with the land at will. Where there is practically no restraint of the landlord's will, in consequence of the will and the restraining power being in the same person, there can be no opposition (in the qualified sense intended above) to the landlord such as is inherent in the holding of a raiyat ; and while this state of things lasts, the raiyati right is so far in abeyance that it cannot undergo any change in its character." See Lal Bahadur *v.* E. Solano, I. L. R., 10 Cal. 45; 12 C. L. R., 559; Jardine Skinner & Co. *v.* Sarat Sundari Debi, 3 C. L. R., 140; Rai Kamal Dasi *v.* Laidley, I. L. R., 4 Cal. 957. Sub-sections 1 and 2 clearly lay down that a person interested as proprietor and permanent tenure-holder, whether jointly or singly shall lose his occupancy right in land cultivated by him. The difference betwee the provisions of sub-sec. 2 and those of sub-sec. 3 is deliberate and intentional.—Mayseyk *v.* Bhagabati, I.L.R., 18 Cal. 121. Both under the former and the present law, a person jointly interested in land as ijaradar does not thereby lose his occupancy rights, and *a fortiori* his entire rights as a tenant, in land held and cultivated by him as a raiyat—Mayseyk *v.* Bhagabati, I. L. R., 18 Cal. 121 ; also see Gurbuksh *v.* Jeo Lal, I. L. R., 16 Cal. 127.

Incidents of Occupancy Right.

Rights of raiyat in respect of use of land.

23. When a raiyat has a right of occupancy in respect of any land, he may use the land in any manner which does not materially impair the value of the land or render it unfit for the purpose of the tenancy; but shall not be entitled to cut down trees in contravention of any local custom.

This section must be read with s. 178 (3) (*b*) which prescribes that nothing in any contract between the landlord and the tenant, after the passing of this Act, shall take away, or limit the right of an occupancy-raiyat to use land as provided by this section and with s. 155.

Use the land:—The statutory right of occupancy under Act VIII of 1869 (B. C.) cannot be extended so as to make it include complete dominion over the land, subject only to the payment of a rent liable to enhancement. The landlord is still entitled to insist that the land shall be used for the purposes for which it was granted; and although

What the occupancy-raiyat cannot do.

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the Court in such cases will be disposed to place a liberal interpretation on the rights of the tenant, it will not sanction a complete change in the mode of enjoyment.—(Baboo Lal Sahu *v.* Deonarain Sing, 2 C. L. R., 294; I. L. R., 3 Cal., 781.)

What he can do.

This case was distinguished in Prosunno Kumar Chatterji *v.* Jagunnath Bysak, 10 C. L. R., 25, where the land, with the consent of the zemindar having ceased to be agricultural, and the tenant having since built a homestead or used part of it for tanks or gardens, the nature of the tenure was held not thereby changed, not the tenant thereby deprived of any right of occupancy which he might have acquired. "It is true," observes the Court, "that the ruling in the case of Lal Sahoo *v.* Deonarain Singh, I. L. R., 3 Cal., 781, seems rather opposed to this view; but the latter case is very distinguishable from the present in this respect—that there the land was still in a state of agriculture; and what the Court held was, that the tenant had no right, without the landlord's consent, to alter the agricultural nature and use of the land. But here the use apparently has already been changed. A large portion at least of the land is no longer agricultural, but used for the tanks and gardens. In such a case it would seem that the rule laid down by Mr. Justice Ainslie in 6 W. R., Act X, would not apply, and that the building of a pucca house upon land which has ceased to be agricultural, could only have the effect of improving the value of the property and giving the landlord a better security for his rent." Where a tenant has been guilty of a breach of duty in the use of his land, such as making a tank in it, building on it improperly, or changing the character of the cultivation, such conduct does not necessarily operate as a forfeiture, so as to render the tenant liable to ejectment. The tenant of an agricultural holding planted his jote with mango trees to the knowledge but without the consent of his landlord, thus changing the character of the land. More than three years afterwards the landlord sued for a mandatory injunction to have the mango trees removed. *Held*, that having stood by for more than three years and allowed the tenant to spend his labour and capital upon the land without taking any action in the matter, the landlord was not entitled to a mandatory injunction—Noyna Misser *v.* Rupanand, I. L. R., 9 Cal., 609; 12 C. L. R., 300; see also Kedarnath Nag *v.* Khetra Pal, I. L. R., 6 Cal., 34; 6 C. L. R., 569. No tenant taking land is entitled, without some specific agreement on the subject, to change the nature of the land, or to make any permanent alteration in the state of the landlord's property. If a person wishes to lease lands for the purpose of making bricks, that should be the subject of a special agreement between the parties in the same way as when parties take lands for building purposes—(Anund Coomar Mookerji *v.* Bissonath Banerji, 17 W.R., 416). So in a suit for a perpetual injunction against the principal defendants to stop the business of brick-making carried on by them on lands which they had taken under temporary leases from their co-defendants, who were holders of small Jotes within the plaintiff's zemindari and to recover damages for alleged injury done to the lands, where the evidence showed such a continued use of the land for 75 years for the purpose of brick-making as raised a strong presumption of acquiescence on the part of the landlord, and that, so far from injuring the land, the defendants had

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placed it in a better condition than it had been in previously. Held that no case had been made out for the issue of an injunction—(Mr. Peter Nicholl *v.* Tarini Churn Bose, 23 W. R., 298; see 2 W. R., 157; 6 W. R., Act X, 40; 8 B. L. R., 242, App. 70; 11 B. L. R., App. 41: N. W. P., H. C. Rep. F. B. 119, 125). A raiyat with a right of occupancy may build a pucca house on his land, or do what he likes with the land, so long as he does not injure it, to the detriment of the landlord—(Nyamootullah Ostagur *v.* Gobind Churan Dutt, 6 W. R. Act X, 40).

Materially impair the value of the land:—See Chapter IX 'Improvements,' *post*. Section 76 gives what are 'improvements' instead of being 'deterioration' and section 77 provides that a raiyat at fixed rates and an occupancy raiyat may make those improvements, such improvements include construction of wells, tanks and other works of irrigation and storage, thus superseding Tarini Churn *v.* Debnarain, 8 B. L. R., App. 69; Koonjo Bihari *v.* Sheta Baluk, 1 Agra F. B. 119; Jewa Ram *v.* Fulleh Sing, 1 Agra F. B. 125; Sheo Churun *v.* Basanta Sing, 3 All. Rep, 282; they also include the erection of a suitable dwelling house with out-offices thus superseding partially Shiv Das *v.* Bamundas, 8 B. L. R. 242; 15 W. R. 360; Juggut Chunder *v.* Eshan Chunder, 2 W. R. 220; Prosunno Kumari *v.* Sheik Rutton, I. L. R., 3 Cal., 696; Babu Lal Sahoo *v.* Deonarain, I.L.R., 3 Cal., 787; 2 C. L. R. 295, and adopting Nyamutollah *v.* Gobind Chunder, 6 W. R. (Act X) 40; Beni Madhub *v.* Joykishna, 7 B. L. R. 152; 12 W. R. 495; Brojonath *v.* Stewart, 8 B. L. R. App. 51; Durga Pershad *v.* Brindabun, 7 B. L. R. 159, 'unfit for the purposes of tenancy'—*i. e*, for the purpose of agriculture. The improvements do not include excavating earth for making bricks—(Kadambini *v.* Nobin Chunder, 2 W. R. 157; Anand Kumar *v.* Bissonath, 17 W. R. 416. But see Peter Nicholl *v.* Tarini Churun, W. R. 298).

Not entitled to cut down trees, etc:—The burden of proof lies on the landlord to establish a custom prohibiting the cutting down of trees by an occupancy tenant and not on the tenant to establish the contrary:—Nafar Chandra *v.* Ram Lal, I.L.R., 22 Cal. 742; Nafar Chandra *v.* Hazari Nath, I.L.R., 22 Cal. 748, note; Giriza Nath *v.* Mia Ulla, I.L.R., 22 Cal. 744, note; Samsar *v.* Lochin Das, 23 Cal. 853, but it was held in the case of Pyari Lal Pal *v.* Narayan Mandal, I.L.R., 22 Cal. 746, note, that the onus is upon the tenant to prove a custom to cut down a mango tree. Under the English law, "the property in trees is vested in the owner of the inheritance of the land upon which they grow." The landlord, however, is entitled to the trees which are likely to grow into timber, whilst the property in bushes is in the tenant.—Woodfall's Landlord and Tenant p. 658. The windfalls of sound timber trees belong to the landlord, but windfalls of trees which are not timber, and of damaged timber trees, belong to the tenant.—*Ibid*, 659. By the term *timber* is meant properly such trees only as are fit to be used in building and repairing houses, but even these must be not less than six inches in diameter or two feet in girth to be considered as "timber:"—Whitty *v.* Lord Dillon [1869], 2 F. & F., 67. Under the old law in India a zemindar had a right to the trees grown in his land by the tenant, who, though he may enjoy the benefit of the growing timber, has no power to cut the trees down. The zemindar may sue to have his title in the growing trees declared—(Sheik

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Abdool Rahaman *v.* Dataram Bashee, Sp. W. R., 367); so in I. L. R., 2 All., 896, it has been held that trees accede to the soil, and pass to the landholder with the land on the termination of a tenancy, and unless the tenant uses, during the term of his tenancy, his privilege, where he has it, of removing the trees, he cannot do so afterwards; he would then be deemed a trespasser.—Compare also Chatoorbhuj Tewari *v.* Syud Villaet Ali Khan, Sp. W. R. 223; Musst. Ameerun *v.* Musst. Sunjeda, 11 W.R., 226. The Bengal Tenancy Act makes no specific provision regarding the right to the trees growing on the holding of a *raiyat*; such right is dependent on custom, though the tenant would appear to have ordinarily a right to enjoy all the produce. Under section 23 he is debarred from cutting them down, without the consent of the landlord, in contravention of any local custom. This evidently means that he may do so unless there is a custum to the contrary. The Calcutta High Court has drawn a distinction between the right of merely cutting down the trees and that of appropriating them after they have been felled. The onus of establishing that there is a custom against the tenant with occupancy rights cutting down the trees is on the landlord, but the burden of showing that the *raiyat* has a right to appropriate them after they have been felled is on him.—Nafar Chandra Pal Chowdhuri *v.* Ramlal Pal I. L. R., 22 Cal., 742. On his failure to establish such a custom, he is liable for damages. But this liability may again be limited by custom. For example, the zemindar may, by a custom of the zemindari, only be entitled to receive a certain proportion of the value of the trees cut down by the raiyats without his consent.—Nafar Pal Chowdhuri *v.* Hazari, I. L. R., 22 Cal. The onus of proving such a custom would also be on the raiyat. Where it is customary for *raiyats* on occasions of cremations or village feasts to cut down and appropriate valueless or *agachha* trees growing on their holdings, simply with thepermission of the headman, without any payment and without the consent of the landlord, no action for damage could be maintained:—Sansar Khan *v.* Lochin Das, I.L.R., 23 Cal. 834. Certain occupancy *raiyats* were, by the custom of the zemindari, entitled, after obtaining the permission of the village *barua*, to cut down and appropriate *agachha* trees for fuel. No payment was ever made for such permission. The raiyats cut down and appropriated some *agachha* trees grown upon the lands after they had entered into possession. In a suit for damages it was held that, even if permission to cut the trees had not been given, the zemindar had in no way suffered damage, and had no cause of action, and that the onus of proving the custom of the zemindari was on the zemindar:—*Ibid.* A tamarind tree is not an *agachhá* or shrub—Nilmani Maitra *v.* Mathura Nath Joardar, 4 C.W.N., clix. But where a lease was granted for the express purpose of clearing jungle land and bringing it under cultivation, and there was no reservation in the lease of the right in the trees the lessee had the right to appropriate them, when cut:—Man Mohini *v.* Raghunath Misra, I.L.R., 23 Cal. 209. Where the tenant has a perpetual lease at a fixed rent and the lessor is entitled to a quit-rent and has reserved no reversionary interest in the land or the trees, the ownership in the trees belongs to the lessees:—Sarada Sundari *v.* Gonesh Sheik, 10 W. R., 419. The latest decision on the point, however, is that of Goluk Rana *v.* Nobo Sundari Dasi, 21 W. R., 344. The lease in this case was a *peshcushi* sunnud, or grant at a quit

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rent, of one and a half beeghas of "*kunabastoo*" and waste jungle land; and after specification of boundaries, the deed goes on to recite: Within these limits I have given to you to cultivate as a jote this land; having brought it into cultivation at your own cost, you shall yearly pay me the fixed annual *peshcushi jumma* of Rs. 2-8. Having paid rent into my zemindari kutcheri, you, your sons, and your sons' sons and descendants in succession shall continue to hold the land defined above. The *peshcushi jumma* shall never be changed. Therefore I give you this *peshcushi* sunnud. Birch J., observed: "There is nothing peculiar in this country about the form of this lease. It corresponds to the '*emphytensis*' of the civil law, which was an assignable inhertiable right in a certain tract of land capable of yielding fruits by virtue of which, and in return for the payment of a yearly quit rent, the holder during the continuance of his right possessed absolutely the entire use and also the fruits thereof. The reasons for granting these perpetual leases are thus assigned by Domat, and I have no doubt that the same reasons actuated proprietors in this country who had tracts of waste land to dispose of and led them to confer grants of a corresponding nature at a low rent. 'Section 544.—For since the owners of barren lands could not easily find tenants for them, a way was invented to give in perpetuity such kind of lands on condition that the grantee should cultivate, plant, and otherwise improve them as the word *emphytensis* signifies. By this agreement the proprietor finds on his part his account by assuring to himself a certain and perpetual rent, and the perpetual tenant finds likewise his laying out his labour and industry to change the face of the ground and to make it fruitful.' He goes on to say (section 549) 'that by giving the land and the reserving the rent, there is, as it were, a partition of the rights of property between the owner of the land and the perpetual tenant. For the owner who grants the perpetual lease remains master in so far as to enjoy the rent which he has reserved as the fruit of his own proper lands by which he retains the chief right of property, which is that of enjoying the thing as owner of it together with the other rights which he has reserved to himself. And the perpetual tenant on his part acquires the right of transmitting the estate to his successors for ever, of selling it, giving it away, alienating it with the burdens of the rights which the lessor of the rights has reserved to himself, as also a right to plant, to built, and to make what other changes he shall think proper for improving the estate, which are so many rights of property.' The relations existing between the plaintiff and the defendant in the case before us appear to me accurately defined in the last section quoted. At the time the grant under consideration was made the land was waste and jungle. No rights were reserved. To enable the grantee to cultivate he first had to cut down and root out the original jungle, and he was free to plant trees, or sow crops as he thought fit. So long as he obtained his rent, the grantor could not interfere with him. There being an express grant, the question of custom need not be considered. I can find only one case in which the point before us has been raised; the report of that case, W. R., 1864, p. 367, is so meagre that it is of no importance to us: what the nature of the raiyats' lease was in that case is not stated, and it has not been cited as an authority. It may be the custom in some parts of the country

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that is between the zemindar and ordinary raiyats, holding under terminable leases, the right to growing trees is with the zemindar; with that question we have nothing to do. We have simply to decide whether the plaintiff-talukdar is the owner of the trees, the subject of this suit. In my opinion such a claim is untenable. The zemindar has, under such circumstances as are disclosed in this case, no more right to the trees planted by the defendants then he has to the crops sown by him. But as already pointed out in the case of raiyats with only rights of occupancy, according to the decision in Nafar Chandra Pal Chowdhuri *v.* Ramlal Pal, and the long series of decisions cited in that case, the trees are the property of the proprietor of the land on which they grow, though the tenant has a right to enjoy all the benefit that the growing timbers may afford him during his occupancy, and to cut them down subject to a custom to the contrary. But the proprietor's rights are subject to modification or complete extinction by contract and custom. In Nafar Chandra Ghosh, *v.* Nand Lal Gosvami, I. L. R., 22 Cal. 751, notes, it was found that by custom of the zemindari, the zemindar was entitled to recover only one-fourth share of the value of the trees cut down by the raiyats, when the raiyats had had them cut down without his consent or permission. In Allahabad it has been held that a zemindar claiming a right to the fallen wood of self-sown trees growing on an occupancy holding must prove some custom or contract, by which he is entitled to such wood, there being no general rule in India to the effect that there is a right in the landlord or a right in the tenant by general custom to the fallen wood of self-sown trees.—Nathan *v.* Kamla Kuar, I. L. R., 13 All., 571.

Render it unfit for the purpose of the tenancy:—Does the transfer of an occupancy right render it unfit for the purpose of the tenancy? This brings us to the question of transferability.

"Turning now to the incidence attached to the right of occupancy, it will be seen that we have made a most important change in regard to one of these incidents—transferability. Instead of legalising it and regulating it by law, we have left if everywhere to custom."—(S. C. B. III.)

An occupancy-raiyat can not transfer his holding.

The ss. 23—26 give what the incidents of an occupancy right are, but they do not include transferability or sub-letting. Transferability, however, is not expressly prescribed; on the contrary, it is recognized when custom allows it (see ss. 178 (3) and 183); and sub-letting is legalised by s. 85. The following, however, is a brief account of the case-law on the subject of transferability of an occupancy right.

Transferability of the occupancy right:—The original scheme was to make the right transferable, but it has been abandoned on account of the many difficult questions that arose out of it. The old Acts [X of 1859, or VIII of 1869 (B. C.)] did not define a right of occupancy: They simply provided that the raiyat holding for the prescribed period "shall have a right of occupancy in the land, so long as he pays the rent." The right was not expressed to be heritable, but it was provided that "the holding of the father or other person from whom a raiyat inherits shall be deemed to be the holding of the raiyat within the meaning of this section." That

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provision only referred to the acquisition of the right—(Nim Chand Borua *v.* Moorari Mundle, 8 W. R., 127), and the right when acquired was nowhere declared to be heritable; and literal meaning of the terms used would not necessarily include an hereditary quality in the right. Moreover the right being one created by statute, although analogous in some respects to the right of the ***khudkasht***, its nature cannot be ascertained by a reference to the rights of the ***khudkasht*** or to custom. Occupancy tenants may of course have customary or other rights in addition, but it is difficult to see how these can assist in determining their rights as occupancy-raiyats. Apparently the strict terms in which the right is bestowed would be satisfied by giving the raiyat a personal right neither hereditary nor transferable. Accordingly Sir Barnes Peacock in one case doubted whether a right of occupancy was heritable.—(Ajodhya Persad *v.* Musst. Emam Bandee, F. B., 7 W. R., 528 B.L.R., Sup. Vol., 725, S. C.; 2 Ind. Jurist, 192, see also Rani Durga Sundari *v.* Brindavan Chandra Sarkar, 2 B. L. R., App., 37; 11 W. R., 162.) Sections 20 and 21 of this Act now attempt to define a settled raiyat, and s. 26 makes the right expressly heritable. Where a raiyat succeeded to the holding of his uncle, who had a right of occupancy, and was allowed by the zemindar to continue in the holding for eleven years, it was held that though the plaintiff was not strictly entitled to succeed by inheritance, yet he must be taken to have succeeded to the holding by the consent of the zemindar and acquired a right of occupancy—(Musst. Hakeemunnesa *v.* Bhooria, 5 All., 23.) A distant relation of a deceased raiyat was under the old law not entitled to succeed to inheritance, when the zemindar had, on the death of the raiyat, made arrangements with another raiyat.—Jotee Ram Sarma *v.* Mungloo Sarma, 8 W. R., 60. This decision in fact goes to establish what we have stated above that the right when acquired was nowhere mentioned in the old law to be heritable. Section 26 of the new Act, however, settles the whole question. The right of occupancy is necessarily acquired by holding upon a tenure which is either hereditary and transferable or not; and at one time it was a question whether a right to occupy, and not to be ejected so long as the rent is paid is added to the rights already existing, so that it becomes part of the tenure, and goes with it, being transferable when the original tenure was so. It has been held that the acquistion of an occupancy right would not render a tenure transferable which before was not so. It was not the intention of the Legislature, when passing Act X of 1859, to alter the nature of a jote and convert a non-transferable jote into a transferable one, merely because a raiyat had held it for twelve years, and thereby acquired a right of occupancy.—(Ajodhya Persad *v.* Musst. Emam Bandee Begum, 7 W. R., 528 (F. B.). To the same effect is Rani Doorga Sundari *v.* Brindavan Chundra Sarkar, 2 B. L. R., App., 37; 11 W. R., 162.) On the other hand, it has been said that a right of occupancy is perpetual, transferable and heritable.—(Musst. Taramani Dasi *v.* Bireswar Mazumdar, 1 W. R, 86; Nunka Roy *v.* Mahabir Persad, 3 B. L. R. App. 35; 11 W. R. 405. This view has been over-ruled in later cases, and the right has been decided not to be transferable. A raiyat's right of occupancy resting upon legislation and custom alone is not derived from the general proprietary right given to the zemindar by the Legislature, but derogates from and qualities that

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right. Whatever the raiyat has, the zemindar has all the rest which is necessary to complete ownership of the land; and, amongst other rights, he must have such a right as will enable him to keep possession of the soil in those persons who are entitled to it. The raiyats have no power to transfer their right to have possession of, and to use the soil, for their own benefit—(Bibi Sohodwa *v.* Smith, 12 B. L. R. 82; 20 W. R., 139.) In other cases the transferability appears to have been decided with reference to the original nature of the holding. Thus it has been laid down that a *khudkasht* raiyat with a right of occupancy may transfer if there is a custom authorizing such transfer; that is, if his original holding was transferable, since at the date of this decision there could be no custom which would affect the new right of occupancy created by Act X of 1859—(Chandra Kumar Roy *v.* Kedarmani Dasi 7 W. R., 247; Narendra Narain Chowdry *v.* Ishan Chundra Sen, 13 B. L. R., 274.) In several other cases the same test of transferability is applied or referred to, namely, the original nature of the tenure—(Juggut Chunder Roy *v.* Ramnarain Bhuttacharjee, 1 W. R., 126; Unnopurna Dasi *v.* Ooma Churan Das, 18 W. R., 55; Sreeram Bose *v.* Bissonath Ghose, 3 W. R., Act X, 3.) And in most of the cases in which a right of occupancy was decided not to be transferable, the original tenure was not transferable, and Sir Barnes Peacock said in the Full Bench case of Ajodha Persad *v.* Musst. Emam Bandee Begum, 7 W. R., 528, that it was not intended to alter the nature of the jote by giving the right of occupancy. It has been now decided by a Full Bench of the High Court of Calcutta that the statutory right of occupancy is not transferable as such. This decision is grounded upon the personal nature of the right. Thus Chief Justice Couch says: "It is a right to be enjoyed only by the right person who holds or cultivates and pays the rent, and has done so for a period of twelve years." And again: "The ordinary construction of the words (in section 6) appears to me to be that the right is only to be in the person who has occupied for twelve years, and it was not intended to give any right of property which could be transferred. The question, as I have answered, is solely upon the Act, and independent of the existence of any custom"—(Narendra Narain Roy Chowdry *v.* Ishan Chundra Sen, 13 B. L. R., 274 at p. 288; 22 W. R., 22.) This view is more fully developed in the following extract from the judgment of Mr. Justice Phear in the case of Bibi Sohodwa *v.* Smith, 20 W. R., 139: "As the authorities stand, this question seems to be one of some nicety, and in considering it there is need to bear in mind that the relations between the zemindar and the raiyat are not generally the same as those between the English landlord and tenant. No doubt the zemindar has been made by legislative enactment the proprietor of the land which forms his zemindari, and as regards his *khamar*, *neej-jote* or *seer* land, it may be taken that the cultivator of the soil has generally no other rights than those which he obtains as a tenant by contract with the zemindar, but with regard to the raiyati lands which constitute the bulk of his zemindari, it is much otherwise. Then, while the zemindar is still the proprietor of the land, the raiyats of the village, as the combined effect of custom and legislation, have in most, if not in all cases some right to cultivate the raiyati land of the village, which is altogether

Question settled by a Full Bench.—Not transferable, ipso facto.

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independent of the zemindar, and which, in the case of a raiyat having a right of occupancy, is a right to occupy and use the soil, quite irrespective of any assent or permission on the part of the zemindar. This right resting upon legislation and custom alone, is not derived from the general proprietary right given to the zemindar by the Legislature, but is, as I understand, in derogation of, and has the effect of cutting down and qualifying that right. I may say that, in my conception of the matter, the relation between the zemindar's right and the occupancy raiyat's right is pretty much the same as that which obtains between the right of ownership of land in England, and the servitude or easement which is termed *profit a prendre*. although I need hardly say the raiyat's interest is greatly more extensive than a *profit a prendre*. It appears to me that the raiyat's is the dominant and the zemindar's the servient right. Whatever the raiyat has, the zemindar has all the rest which is necessary to complete ownership of the land: the zemindar's right amounts to the complete ownership of the land subject to the occupancy raiyat's right, and the right of the village, if any, to the occupation and cultivation of the soil, to whatever extent these rights may in any given case reach. When these rights are ascertained there must remain to the zemindar all rights and privileges of ownership which are not inconsistent with or obstructive of them. And amongst other rights, it seems to me clear that he must have such a right as will enable him to keep the possession of the soil in those persons who are entitled to it, and to prevent it from being invated by those who are not entitled to it"—See Regulation VII of 1799, section 15, clause 7. It was held in an early case that the customary right to occupy as long as the raiyat paid the customary or agreed rent could not be transferred, and the zemindar was held entitled to possession as against the transferee—(Baboo Prasanno Kumar Tagore *v.* Ram Mohun Dass, S. D. A. (1855) 14, referring to Harington's Analysis, Vol. III, 434, 465.) The right dealt with in this case may be the right of the *khudkasht*, or an analogous right which has grown up out of mere occupancy. The sale of a jote in execution of a decree against the jotedar does not prove it to be transferable, nor does the purchaser acquire a right of occupancy by his purchase where the right is not dependent on custom, but is a mere creature of the Rent Law—(Kripanath *v.* Doyal Chand, 22 W. R., 169; Ram Chunder *v.* Bhola Nath, 22 W. R., 200; Sheik Ameen Buksh *v.* Bhyro Mundle, 22 W. R., 493; Mrs. M. R. Hyes *v.* Munshi Moneerudden, 25 W. R., 6; see also 25 W. R., 104; Nakoo Roy *v.* Mahabir Persad, 11 W. R., 405; Tara Prosad *v.* Soorjo Kanta Acherjee, 15 W. R., 152; Dwarka Nath *v.* Kanaye Sirdar, 16 W. R., 111; Bootee Sing *v.* Moorat Sing, 20 W. R., 478.) The same view was held in Bhiramali *v.* Gopinath, I. L. R., 24 Cal., 355; 1 C. W. N., 396; Durga Churun *v.* Kali Prasanno, I. L. R., 26 Cal., 727; 3 C. W. N., 586; Sitanath *v.* Atmaram, 4 C.W.N. 571; Sadagar Sarkar *v.* Krishnu Chandra, 3 C. W. N. 742; Jarip *v.* Ram Kumar, 8 C. W. N. 747. Their lordships of the Privy Council have also recently held that under the old rent law a right of occupancy cannot be transferred (Chandrabati Koer *v.* Harrington, I. L. R., 18 Cal., 349; L. R., 18 I. A. 18 I. A., 27). The right of occupancy acquired by a cultivating raiyat under section 6 of the Bengal Act VIII of 1869, cannot be transferred either by a voluntary sale, or gift, or by a sale in execution of a decree—

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(Dwarkanath Misser *v.* Hurish Chunder, I. L. R., 4 Cal., 925.) "As regards the mode of transfer," says Jackson, J., "it is clear there is no ground for distinguishing a voluntary sale from a sale in execution. If a sale by a private contract would validly pass a right of occupancy, then a sale in execution of a decree would equally pass it and *vice versâ*. So far then I think the case is clearly governed by the authority of the Full Bench ruling." In Majid Hossein *v.* Raghubar Chaudhri, I. L. R., 27 Cal., 187, it has been decided that, when an application is made to execute a decree for money by the attachment and sale of an occupancy holding, the judgment debtor is entitled under s. 244, C. P. C., to raise the question as to whether the holding is saleable by custom or usage, and to have that question determined by the Court executing the decree. See also Gahar Khalipea *v.* Kasimuddi, 4 C. W. N., 557. But when a non-transferable holding is sold by a tenant by a *kabala*, he is estopped from setting up the invalidity of the sale by him—(Bhagirath Chang *v.* Hafizudin, 4 C. W. N., 679).

The mode of transfer makes no difference.

But the right of occupancy is transferable where custom allows it. See sections 178 (3) and 183; (see also Joykishen *v.* Rajkishen, 1 W. R. 153 (3 R. J. P. J., 224; Sriram Bose *v.* Bissonath Ghose, 3 W. R. (Act X) 21). As a general rule it has been laid down by the judgment of a Full Bench that when a tenure was not transferable before the passing of Act X, the passing of that Act would not have the effect of rendering it a transferable tenure; but that ruling specially exempts cases in which rights of occupancy or tenures of a similar description were transferable by local custom. It has never been ruled that under no circumstance can a right of occupancy be transferred—(Nukoo Roy *v.* Mahabir Persad, 11 W. R., 405.) In the Full Bench case of Narendro Narain Chowdry *v.* Ishan Chundra Sen, Couch, C. J., observes: "The question, as I have answered, is solely upon the Act, and independent of the existence of any custom." But in order to make a right of occupancy transferable, it must be shown that it is so transferable according to the custom of that part of the country in which the tenure is situated; where no mention is made in a *dowl* of any right to transfer, the existence of the power to transfer cannot be presumed—(Unnopurna *v.* Oma Churn, 18 W. R., 55; Musst. Shunkerputee *v.* Mirza Saifoolla, 18 W. R., 507; Bootee Sing *v.* Moorat Sing, 20 W. R., 478.) In Joykishen *v.* Rajkishen, 1 W. R. 153, the Court observed: "In every district of Bengal there is a different custom, and this question (whether the tenure is transferable by custom) can only be decided by reference to local custom. What is the custom in Lower Bengal is not so on the eastern and the northern parts, and *vice versâ*. In some parts the *khudkast* tenants are allowed to sell without reference to their landlord; in other parts the practice has not been allowed: and the only method by which the question in each case can be decided, is by reference to local custom and not by the evidence of a few antagonistic witnesses. We therefore remand the case to the Judge for the purpose of a local investigation, made with regard to the custom that prevails in that part of the district in which these lands are situate." In Chunder Kumar *v.* Peary Lall, 6 W. R. 190, the Court (Travor and Campbell, JJ.) remarked: "The Judge has held as a fact that the custom of Hooghly

But the right is transferable by custom.

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does not sanction the transfer of khudkast-jotes. That point has not been brought before us, and as the fact depend upon evidence we cannot interfere in special appeal. We think it right to say, however, that a custom of this nature need not be absolutely invariable; it can be proved by evidence amounting to much less than this. Moreover the case which the Judge cites from the Sudder Reports refers to Moorshedabad and not to Hooghly, and therefore can be no authority for proving a custom in the former district." So in Joy Kishen *v.* Durga Narain, 11 W. R, 348, the Court said: "It has been found in evidence that jummas such as the one held by the defendants Nos. 3 and 4 are, by custom of this particular village, transferable; there was no necessity for the witnesses to fix any particular time from which such tenures became transferable from one party to the other. It was sufficient that there was evidence, which the Principal Sadar Amin has credited, of the antiquity of the custom (and this evidence, we may remark, he has given very cogent reasons for crediting) to establish the fact that there is at present the custom referred to and that no evidence to the contrary was adduced. It seems to us that this was legally sufficient evidence, and that we have no power to interfere in special appeal." But the custom must be a custom that sales are effected in spite of the landlord, and proofs of instances of sale must be such that the sales took place without the consent of the zemindar and still held good. In Bibi Sohodwa *v.* Mr. Maxwell Smith, 20 W. R., 139, Phear, J., observed: "The Judge says, that he arrives at the conclusion that the transfers from the raiyats to the defendant upon which the defendant relies are proved; and also that these raiyats had tenures which they were capable of transferring. But it appears very clear that in dealing with the evidence, the Lower Appellate Court very seriously misapprehended the force of a considerable portion of it. We refer to the evidence of sales held in execution of decrees, the evidence consisting partly of parol testimony, and partly we believe of certificates of sales. But in all these instances of sales, so far as they have been brought to our notice, the sales were sales in execution effected at the instance of the zemindar himself; and consequently they could not be evidence of the right on the part of the raiyats to transfer without the assent of the zemindar." So in Bootee Sing *v.* Moorat Sing, 20 W. R., 478, Phear, J. remarked: "Both the first Court and the Lower Appellate Court were agreed in thinking that the defendants Nos. 1 and 2 had failed in proving that they had an old gorabondi right to their jote; but the Lower Appellate Court, upon the evidence which it refers to, was of opinion that these defendants had gained a right of occupancy under the rent law, and that such a right of occupancy was in their village and in their neighbourhood recognised as a transferable right, irrespective of the will of the zemindar. It seems to us more than doubtful whether any evidence could establish that a bare right of occupancy under the Act was transferable irrespective of the will of the zemindar. But however this may be, we are quite clear that the evidence upon which the Subordinate Judge bases his opinion is insufficient for that purpose. All the transfers to which he refers are in terms transfers of a *gorabandi* right; therefore the subject which was transferred by them was something very different from the bare occupancy right to this land, which was all that the Subordinate Judge found to be

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the right of the first two defendants. This being so, we think the Subordinate Judge was wrong in holding that the transfer of the land in question from the first two defendants to the defendants of the second party was valid against the zemindar." There is nothing unreasonable in the custom by which the tenure of *khudkasht* raiyat, who has built a pucca house on his land and has acquired a right of occupancy under section 6, Act X, is a transferable tenure—(Chunder Kumar Roy *v.* Kedar Mani Dasi, 7 W. R., 247.) According to the custom of the Hoogly district, a tenure granted for building purposes is transferable—(Banee Madhub *v.* Joykisen, 12 W. R., 595, which confirm the opinion of the senior judge, Kemp, J., in the same case reported in 11 W. R., 354; compare also Doorga Persad *v.* Bindavan, 15 W. R., 274; Nidhi Kristo *v.* Nistarini, 21 W. R., 386.) A *kadimi* or *mourasi* holding is something very much larger than what is known as a right of occupancy under the rent law; and where, according to the custom of the country, such a holding is transferable tenure, the purchaser takes the whole of the rights of the previous holder against the zemindar—(Nunda Kumar *v.* Lakshmi Pria, 23 W. R., 36.)

The custom must be clear and well defined.—Dwarkanath *v.* Hurish Chunder, I. L. R., 4 Cal., 925. The existence of a custom in a particular district, however, by which a right of occupancy in such a district is transferable, will not justify the holder of such right in subdividing his tenure, and transferring different parts of it to different persons; and in case of such transfer, the zemindar is entitled to treat the transferees as trespassers, and eject them—(Tirthanund Thakoor *v.* Mutty Lal Misser, I.L.R., 3 Cal. 774.) A transfer of an occupancy-holding in accordance with usage is valid even without the consent of the landlord:—Palak Dhari *v.* Manner, 23 Cal., 180. In this case, the observations of their lordships of the Privy Council in Jaggamohan Ghosh *v.* Manik Chand (7 Moo. I. A., 263) on the subject of "mercantile usage" to the effect that "mercantile usage needs not the antiquity, the uniformity or the notoriety of custom," and that "it is enough if it appears to be so well-known and acquiesced in that it may reasonably be presumed to have been an ingredient tacitly imported by the parties into their contract" were referred to, and it was said that "in applying this case, it must be borne in mind that it relates to a usage in dealing in a particular class of mercantile transactions and contracts made in the course of such business. Consequently, in introducing these principles in the present case, which does not relate to contracts entered into between parties to the litigation, but affects a third party, the landlord, it would be necessary to prove the existence of the usage on his estate, or that it was so prevalent in the neighbourhood that it can be reasonably presumed to exist on that estate." In this case it was further pointed out that under both Act X of 1859 and Act VIII, B. C., of 1869, "occupancy rights were not transferable against the will of the landlord save by custom, not mere usage." See note under s. 183 *post*.

When transferable by custom, is subdivision permitted?

The existence of custom in a particular district by which rights of occupancy in such district are transferable, will not justify the holder of such right of occupancy in subdividing his tenure, and transferring different parts of it to different persons; and in case of such transfer the zemindar is entitled to treat the transferees as

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trespassers and eject them —(Tirthanund Thakoor *v.* Mutty Lal Misser, I. L. R. 3 Cal., 774.)

Onus of proof.

There is no presumption that any tenure held is not a transferable tenure and a landlord who sues for *khas* possession on the ground that a tenure was not transferable must establish his case as an ordinary plaintiff.—(Doya Chand *v.* Anund Chunder, I. L. R., 14 Cal. 382). The correctness of this decision is extremely doubtful. The learned Judges (Prinsep and Beverley, JJ.) observe: " In the course of the argument some cases have been cited from the Weekly Reporter, but it is impossible for us to apply the law laid down in those cases because in none of them are the facts stated. We are of opinion that the case of Dwarkanath *v.* Hurish Chunder is not applicable. In that case it was admitted or found that the defendants had occupancy rights, and the learned Judges of this Court in their judgment proceeding on the Full Bench case, Narendra Narain *v.* Ishan Chunder, held that it was for the defendant to prove that such right was transferable. There is nothing in that case to establish the proposition now contended for that it is for the tenant or the person who claims to be the tenant to establish his right to retain the land in any suit brought against him by the zemindar, or whenever the zemindar may think proper to call upon him to show his title. In our opinion the plaintiff is bound to start his case." But the Court forgot that the Full Bench, Narendra Narain *v.* Ishan Chunder, held that the occupancy right is a creation of Act X and is not transferable *ipso facto*. It is therefore on the party who asserts that it is transferable to prove that fact. See Sankarpati *v.* Saifulla, 18 W. R., 507. Suppose an occupancy right is proved in a suit like the above and the question is whether it is transferable the proper test would be to see who would fail if none would offer evidence? Assuredly, the tenant or the purchaser who is treated as a trespasser in Bibi Sohodwa *v.* Smith cited above. The effect of the decision under comment was practically to disturb the settled case law on the point. There has been a contrary decision since. The onus of proving the transferability of a raiyat's holding is upon the party who alleges it to be of a permanent and transferable character.—Kripamayi *v.* Durgagobind, I. L. R., 15 Cal. 89.

Effect of transfer of holding by an occupancy or a settled raiyat:—There has been considerable discussion as to the effect of a transfer of a holding in which the tenant has only a right of occupancy, and which, as we have seen, cannot itself be transferred. In Joy Kishen Mukerji *v.* Raj Kishen Mukerji, 5 W. R., 147, the zemindar sued for possession against the transferee, contending that the transfer gave the transferee no rights. It was held that the landlord could not evict the transferee so long as the recorded tenant or his representatives paid the rent, but that he was not bound to recognize the transfer or take rent from the transferee. The effect of this decision is to keep the right and liability in the originalt enant, the transferee being regarded as a lessee of the occupancy-holder. Other decisions agree in this view.—(Ajoodhya Persad *v.* Musst. Emam Bandee Begum, 2 Ind. Jurist, 192; B. L. R., Sup. Vol., 725, S. C.; 7 W, R., 528; Rani Durga Sundari *v.* Brindavan Chundra Sarkar Chowdhry, 2 B. L. R., App., 37; 11 W. R., 162; Suddye Purira *v.* Boistub Purira,

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15 W. R., 261; Dwarka Missree *v.* Kanye Sirdar, 16 W. R., 112.) This in fact is consistent with the principle that an occupancy-raiyat may lease (Jumeer Gazee *v.* Gunai Mundle, 12 W. R., 111; Bibi Sohodwa *v.* Smith, 20 W. R., 139); or grant a mokurari lease without rendering his lessee liable to ejectment.—(Dumree Shaik *v.* Bissesvarlall, 13 W. R., 291.) Again it has been held that the transfer is not a forfeiture.—(Gora Chund Mustafi *v.* Borada Persad Mustafi, 11 W. R., 94; Suddye Purira *v.* Boistub Purira, 15 W. R., 261; Dwarkanath Missree *v.* Kanye Sirdar, 16 W. R., 112.) In Hurrihur Mookerjee *v.* Jadoo Nath Ghose, 7 W. R., 114, it was said that a tenant with a right of occupancy could not transfer his title without possession as against the zemindar or talukdar; that if a raiyat having non-transferable tenure quits possession and gives over the land to a stranger, he may be treated as having abandoned his rights in the land, or as a tenant-at-will whose tenancy is determined, and that the landlord may sue to have it declared that no interest vests in a purchaser from such tenant. In one of the latest cases on the point, however, a view somewhat different to those before referred to is taken.—(Bibi Sohodwa *v.* Smith, 12 B. L. R., 82.) In this case Mr. Justice Phear treated a transfer neither as a forfeiture by the original raiyat nor as conveying a right to the transferee; he held the transferee to be a mere trespasser as against the zemindar, whom he considers entitled to keep his own tenant in possession and to evict the transferee, who cannot plead as against the zemindar to resume his occupation. "The defendant," observed Phear, J., "is in actual possession of the soil, tilling and using it for his own benefit, and he has got himself into that situation under colour of an alleged transfer to him, effected by certain raiyats of their right to have possession of and to use the soil for their own benefit; but upon the plaintiff's case these raiyats had no power to make such a transfer of their rights, and therefore so far as title in himself is concerned, derived through this transfer, the defendant clearly has no right to the possession. Then, can the defendant say that, as regards the plaintiff, the transaction of transfer, although it failed to pass any right to the defendant himself, yet served to place the defendant's possession under the protection or sanction of his grantor's right? I think not; because I cannot extend the mere right of occupancy beyond the right on the part of the person entitled to it, to occupy and till the soil, either by himself or his servants, or by his lessees or licensees, *i. e.*, at the furthest, by persons who are in some degree subordinate to him, and under his control, throughout the whole time of the possession. Now it is very plain on the plaintiff's facts, that, as between the defendant and his grantors, the defendant cannot possibly be in any degree dependent upon them in the matter of the possession, because he has obtained from them a complete transfer of all their rights. It appears to be almost absurd to hold that a zemindar in such a case as that made by the plaintiff, where no matter of estoppel occurs, is obliged to treat the possession of one, who is, and whom he knows to be entirely free of all dependence upon his raiyat, as being the possession of that raiyat; and I think I could, if it were necessary, show that serious mischief might in practice ensue from the application of this doctrine. Thus on plaintiff's facts, I arrive at the conclusion that the defendant has no title himself to the occupation of the soil, and that his occupation of it cannot be justified

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by the force of his grantor's title. Therefore in my opinion the defendant is an entire stranger to the soil, and a trespasser; and the zemindar, as owner, has a plain right to evict him, in order to protect the possession, if in so doing he only exercises a right of ownership which is not in conflict with the raiyat's right of pessession. Then, does the act of recovering back the possession from a stranger, who, as against the zemindar, is wrongfully holding it, conflict with the right to that possession on the part of the raiyat, who voluntarily parted with it? It appears to me plainly not; for the only right, if any, which under the circumstances the raiyat can have left to him, is to regain the possession from the zemindar after the latter has recovered it form the stranger; because he certainly could not himself recover it from the stranger to whom he had transferred it for valuable consideration. And if he had no right, as against the zemindar, to transfer the possession, surely no right of his to the possession can be infringed by the zemindar's claiming the possession from the transferee, though possibly on being obliged to refund the purchase-money, he may turn to the zemindar, and successfully maintain that his ineffectual attempt at transfsr did not cause him to forfeit his original right to occupy the land." In the Full Bench decision of Narendra Narain Chowdry *v.* Ishan Chandra Sen, 13 B. L. R. 274, which may be treated as a full settler of the question, it was held that an attempt to transfer a right of occupancy by a raiyat, who quits his occupation and ceases himself to cultivate or hold the land, may be treated as an abandonment of the right so as to entitle the landlord to evict the transferee. In his judgment in this case Mr. Justice Phear said: "I ought however perhaps to remark with regard to an observation which has been made in the case of Bibi Sohodwa *v.* Smith, that it was obviously not the intention of the Bench which passed that decision to say anything judicially as to whether or not the grantors or transferors of the jote in the case still had, in the events which had happened, any right to require possession of the land at the hands of the zemindar. All that that decision decided was that whatever the rights of the transferors as against the zemindars might be, those rights did not prevent the zemindar, under the circumstances of the case, from recovering possession of the land from a stranger." The right of two or three joint tenants of a raiyati tenure held under the plaintiffs was sold in execution of a decree of a Civil Court, and purchased by *A* who continued the former holders in immediate occupancy of the lands. The plaintiffs sued for possession. No special custom allowing the transfer in the district of such tenures having been proved, *held*, that there was no transfer by the sale to *A* of the occupancy-rights of the raiyats; that the raiyats had, by agreeing to hold under *A*, abandoned their rights of occupancy as much as if they had gone away from the land, and that therefore plaintiffs were entitled to *khas* possession. - (Dwarkanath *v.* Hurish Chunder, 4 C.L.R., 130; I. L. R., 4 Cal., 925). But an occupancy raiyat who asserts a transferable right in his lands and sells that right to stranger without giving up his occupation is not liable to ejectment by the superior landlord whom he may have repudiated in a suit brought against him for arrears of rent, and set himself up as a tenant of the purchaser:—Srishtee Dhur *v.* Madan Sirdar, I.L.R., 9 Cal. 648; their Lordships (Wilson and Maclean. JJ.) in deciding this case considered the cases of Narendra Narain Roy Chowdhry *v.* Ishan Chandra Sen, 13

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B. L. R. 274: I. L. R. 22 W. R. 22, and the case of Dwarka Nath Misser *v.* Hurrish Chandra, 22 W. R. 200, and observed as follows :—"In Narendra Narain Roy Chowdhry *v.* Ishan Chandra Sen, it was ruled that the transferee of occupant rights, illegally sold, could be ejected if he had entered into actual possession of the land. The principle involved in that case was the abandonment by the tenant of his connection with the land, and the landlord's consequent right to re-enter. This principle is re-asserted in Ram Chandra Roy Chowdhry *v.* Bhola Nath Luskur (2), and is also referred to in a recent judgment delivered on 17th January 1883 (Appeal from Appellate Decree No. 1655 of 1881, Mitter and O'Kinealy, JJ.). In Dwarka Nath Misser *v.* Hurish Chunder (3), there is a remark which seems to indicate that occupant raiyats who after sale remain upon the land by permission of the transferee, as his tenants, do so under circumstances amounting to an abandonment of their right of occupancy, and the result of that case shows that neither they nor the transferee can resist an action to eject them: but it must be remarked that in that case the raiyats did not question the decree of their ejectment by appeal to this Court, and therefore we need not consider the judgment as deciding anything contrary to the other cases quoted above. We accordingly follow those decisions and dismiss the appeal with costs." D was an occupancy raiyat of the plaintiff, a 14 anna-share holder in a zemindari and unknown to the plaintiff sold half of his holding to the sons of his brother. The plaintiff then sued D for arrears of rent. D pleaded that he could not be sued for the whole amount, as he was only in possession of half of the holding. Subsequently that to rent was paid into the Collectorate by D and by his brother's sons. In a suit by the plaintiff to eject D and his transferees on the ground that D had forfeited his rights by transferring half of his holding, *held* that under the Bengal Tenancy Act (VIII of 1885) the sale or parting with the whole or part of a holding is not a ground of forfeiture.—Kabil Surdar *v.* Chunder Nath, I. L. R., 20 Cal., 590. The transfer by a raiyat with a right of occupancy of a part of his holding does not entitle the landlord to recover possession of the land transferrred by ejecting the transferee, in the absence of evidence to show that by custom such transfer is allowed —Durga Prasad *v.* Doula Gazee, 1 C. W. N. 160; although the landlord in such a case is not entitled to *khas* possession, he is yet entitled to a declaration that the transfer of a portion of his holding which has not been made with his written consent as is provided by sec. 88 is not binding on him.—Shiekh Gazaffer *v.* E. Dalgleish, 1 C. W. N. 162; but where a tenant transfers his non-transferable holding he must be taken to have abandoned the holding if he ceases to pay rent to his landlord and accepts a new tenancy from the transferee, and the landlord is therefore entitled to eject the transferee as a trespasser:—Kali Nath *v.* Kumar Upendra, 1 C. W. N. 163: I. L. R. 24 Cal. 212. Where a tenant transfers his non-transferable holding and abandons possession of it, the landlord is entitled to eject the transferee:—Robert Wilson *v.* Radha Dulari, 2 C. W. N. 63. When occupancy-rights, transferable by custom, to have it declared that they have acquired certain rights; but it is clear that if it is the object of such a suit to have it declared that the old tenant is no longer responsible for the rent, and that the transferee is so responsible to the land-

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lord, such a declaration cannot be obtained without the service of the notice prescribed by s. 73—Ambika Pershad *v.* Chowdry Keshri, I. L. R., 24 Cal. 644, but it has been held that the transfer of a portion of an occupancy holding is contrary to the spirit of s. 88, and the existence of a custom in a particular place by which such a holding is transferable is immaterial and gives no right to the transferee as against the landlord—Kuldip *v.* Gillanders, I. L. R., 26 Cal. 615: 4 C. W. N. 738. Even where occupancy-rights are transferable, an occupancy raiyat cannot transfer different parts of it to different persons and in case of such transfers the landlord is entitled to treat the transferees as trespassers and eject them.—Tirthanund Thakoor *v.* Mutty Lall, I. L. R., 3 Cal. 774.

Where question of transferability does not arise:—Where a non-transferable holding is sold by a tenant by a *kabala* he is estopped from setting up the invalidity of the sale by him:—Bhagnath *v.* Sheikh Hafizuddin, 4 C. W. N. 699. A certain jote was sold in execution of a decree for arrears of rent obtained against the recorded tenant, and the purchaser of a portion of the jote from the latter claimed the surplus sale proceeds representing the portion purchased by him, the defendant objected to the same on the ground that he was the purchaser of the jote; the lower Courts held that defendant could not prove his purchase; the landlord was not a party. *Held*—That the question of the transferability of the jote did not arise.—Ambikanath *v.* Adityanath, 6 C. W. N. 624.

Registry of the transferee's name:—In any case in which a raiyati holding is transferable, it is not necessary that the transfer should be registered in the sherista of the landlord—(Taramani *v.* Birgvan, 1 W.R., 86; Wooma Churn *v.* Hari Prosad, 10 W. R. 101; 1 B.L.R.S.N., 7; Joykishen *v.* Doorga Narain, 11 W. R., 348; Karoolal *v.* Luchmeeput, 7 W. R., 15). See, however section 73, *post*. In the case of a holding transferable by custom, the receipt of rent from the transferee by the landlord with knowledge of the transfer puts an end to the connection of the transferor with the holding.—Abdul Aziz Khan *v.* Ahmed Ali, I.L.R., 14 Cal., 795. Ss., 12 and 16 apply only to permanent tenure-holders and raiyats holding at fixed rates.

Recognition of transfer by the landlord:—If the landlord registers the name of the transferee or his heirs, no question of the validity of the transfer will arise, such registration amounting to a recognition of the transferee—(Amin Buksh *v.* Bhyro Mundal, 22 W. R., 493); so by receiving rent from the transferee with the knowledge of the transfer, a recognition may take place—(Nobo Kumar Ghosh *v.* Krishna Chandra Banurji, W. R., Sp. No., 1864, Act X, 112; Mritanjai Sirkar *v.* Gopal Chandra Sarkar, 10 W. R., 466; Bharat Rai *v.* Ganga Narain Mahapatro, 14 W. R., 211; Allender *v.* Dwarkanath Rai, 15 W. R., 320; Amin Baksh *v.* Bhairo Mandal, 22 W. R., 493). The same effect will result from the landlord having allowed sums paid have been transferred, it is open to the transferees to sue under the Specific Relief Act in to the Collectorate as rent by the transferee to be carried to his credit (Ram Gobind Rai *v.* Dashubhuja Debi, 18 W.R. 195); and from his having made the transferee a party to a suit for rent and from his accepting a decree against him jointly with others (Ram

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Kishor Acharji *v.* Krishna Mani Debi, 23 W.R., 106; Mahomed Azmal *v.* Chandi Lal Pandey, 7 W.R., 250. But the acceptance of rent paid by the transferee as *marfutwaree* is no recognition—(Khudiram *v.* Rokhini, 15 W. R., 197); nor the acceptance of rent paid by the transferee without notice that he claims to pay rent by right of transfer.—(Gourlal *v.* Ramesvur, 6 B. L. R. App. 92).

Right to accretion:—An occupancy raiyat is entitled to the benefit of s. 4, cl. (1) of Reg. XI of 1825 and when there is an accretion to his holding he is entitled to hold the lands as an accretion to his jote: —Gour Hari *v.* Bhola Kaibartto, I.L.R., 21 Cal. 233; Gobind Monee *v.* Dina Bundhoo 15 W.R. 87; Ali Moollah *v.* Sahebullah 15 W. R. 149, Bhagabat *v.* Durg Bijai, 8 B. L. R. 73: I. L. R., 16 W. R. 95. See notes under s. 52.

Reg. XI of 1825.

Right to redeem a mortgage:—The words "any person having any interest in or charge upon the property," in sub-section (*a*) of s. 91 of the Transfer of Property Act do not include a raiyat and he is not therefore entitled to redeem the mortgage of his superior interest, although the raiyati lease was created after the date of the mortgage:—Giris Chunder *v.* Juramoni, 5 C. W. N. xxiii.

Redemption of mortgage.

Incumbrance:—An occupancy or non-occupancy holding if not held by a *khudkast* raiyat, *i.e.*, a resident and hereditary cultivator, is an incumbrance and not protected from ejectment by the terms of cl. 3, s. 11 of Regulation VIII of 1819, and may be annulled by a purchaser at a sale under the said Regulation:—Jogeshwar *v.* Abed Muhomed, 3 C. W. N. 13.

Reg. VIII of 1819.

Right to share in Compensation under Land Acquisition Act:—An occupancy raiyat is a person interested within the meaning of the expression "person interested" in s. 3, cl. (6) of the Land Acquisition Act:—Gudadhar *v.* Dhanput, I.L.R., 7 Cal. 585. Garth C. J., observed in this case: "The parties who usually suffer most from lands being taken for Government purposes are either the raiyats with right of occupancy, or the holders, whoever they may be, of the first permanent interest above the occupancy raiyats. The actual occupier is of course turned out by the Government, and if he is a raiyat with a right of occupancy, he loses the benefit of that right, besides being driven possibly to find a holding and a home elsewhere; and the holder of the tenure immediately superior to the occupying raiyats, whatever the nature of his holding may be, loses the rent of the land taken during the period of his holding. These two classes, therefore, would, generally speaking, be entitled to the larger portion of the compensation." When the Government acquires land under the Land Acquisition Act, the occupancy tenant is usually allowed a portion of the market value as compensation without reference to the question whether the occupancy right is transferable or not:—*per* Gupta, J., Ambika Nath *v.* Adityanath, 6 C. W. N.

Occupancy raiyat entitled to compensation even when holding not transferable.

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Obligation of raiyat to pay rent.

24. An occupancy-raiyat shall pay rent for his holding at fair and equitable rates.

Old Act:—Section 5 of Act X of 1859, and Act VIII of 1869 (B. C.), had "Raiyats, having rights of occupancy, but not holding at fixed rates as described in the two preceding sections, are entitled to receive pottas at fair and equitable rates. In case of dispute, the rate previously paid by the raiyat shall be deemed to be fair and equitable, unless the contrary be shown in a suit by either party under the provisions of this Act." This provision is divided in the present Act into three parts, *viz.*, ss. 24, 27 and 35.

Fair and equitable rates:—The grounds of enhancement set forth in s. 30 (and possibly in s. 29) are all subject to the limitation of this section and s. 35. Under no circumstances can a raiyat, with a right of occupancy, be called upon to pay more than a fair and equitable rent—(Noor Mohomed *v.* Huree Prosunno, Sp. W. R., Act X, 75); and in determining what is fair and equitable the Court may take into consideration the rise in wages; but it does not necessarily follow that because wages are double what they were, and the necessaries of life have risen, that the old rent is fair and equitable under the altered state of circumstances.—(Savi *v.* Jeetoo Meah, Marsh., 86.) In a suit to enhance the rate of rent of an occupancy-raiyat, the sole ground being an increase in the value of the produce, the words "fair and equitable" in s. 5 are to be construed as equivalent to the varying expressions "pergunna rates," "rates paid for similar lands in the adjacent places," and "customary rates," and mean not the rate obtainable by open commercial competition, but the prevailing rate payable by the same class of raiyats for lands of similar description and with similar advantages in the places adjacent. If the customary rate of the neighbourhood had not been adjusted with reference to the increased value of the produce, and an adjustment is requisite in consequence of a rise in the value of the produce caused simply by a rise in the price, and by causes independent both of the zemindar and raiyat, the rule of proportion to be adopted in such adjustments is that the old rent should bear to the increased rent the same proportion as the former value of the produce of the soil calculated on an average of three or five years next before the date of the alleged rise in value bears to its present value.—(Thakurani Dasi *v.* Bishessur Mukerji, 3 W. R., Act X, 29.) If the rent of a raiyat consists partly of money and partly of services, —an obligation to cultivate and supply indigo at a certain price,—the value of such contract would have to be estimated and added to the old rent, and the aggregate value would form a term in the proportion.—(*Ib.*, Norman, J., p. 95.) This rule of proportion should be adopted only in the absence of any recently adjusted pergunna customary rates; and either party is at liberty to prove any special circumstances tending to show that the application of the rule of proportion will work injustice.—(*Ib.* Macpherson, J., p. 48.) A claim to enhancement based on the increased productive power of land, or on the increased value of its produce, can only take effect in cases where the neighbouring rates of rent have not accommodated themselves to the altered state of circumstances,—where in short, all the raiyats together are paying less than

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the fair rate of rent; and to such cases, the principle of the Full Bench Ruling in the case of Thakurani Dasi would apply. But where there already exists a guide to what is a fair rate of rent, the precedent is inapplicable.—(Sreesh Chunder *v.* Assimunessa, 7 W. R., 234.) The rule of proportion as laid down in the Full Bench case of Thakurani Dasi, applies only to cases in which the sole ground of enhancement is an increase in the value of produce, and to cases in which the rates have not adjusted themselves to altered circumstances. It is inapplicable to cases where the value of the produce has not only increased, but the productive powers of land have decreased and the expenses of cultivation have increased also. In such cases the value of the present decreased average rate per bigha, calculated on the produce of three or five years, must be found; and it must be contrasted with the average value of the produce before the decrease in the productive powers calculated in the same way, and the increased present cost of production, as contrasted with the former cost per bigha, must be ascertained also. When these data are ascertained the formula to be applied will stand thus: The average value of the produce before the decrease in the productive powers of the land will be to the average value of the present decreased produce, *minus* the increased cost of production as the rent previously paid will be to that which the land ought now to pay.—(Showdamini *v.* Shookul Mahomed, 7 W. R., 94.) For the rule of proportion laid down by the Great Rent Case, the present Act has substituted another rule similar to it. See s. 32. "By fair and equitable rent the Rent Commission understood it to be such a share of the produce of the soil as shall leave enough to the cultivator to enable him to carry on the cultivation, to live in reasonable comfort and to participate to a reasonable extent in the progress and improving property of his native land"—(R. C. R., Vol. I, p. 24.)

Protection from eviction except on specified grounds.

25. An occupancy-raiyat shall not be ejected by his landlord from his holding except in execution of a decree for ejectment passed on the ground—

(*a*) that he has used the land comprised in his holding in a manner which renders it unfit for the purposes of the tenancy, or

(*b*) that he has broken a condition consistent with the provisions of this Act, and on breach of which he is, under the terms of a contract between himself and his landlord, liable to be ejected.

This section should be read with ss. 65, 89 and 155 and 178 (1) (*c*). Section 65 provides that an occupancy-raiyat shall not be ejected for arrears of rent. Section 89 provides that no tenant shall be ejected from his holding, except in execution of a decree. Section 178, sub-section (1) (*c*), provides that no contract made with the landlord, either before or after the passing of the Act, shall entitle a landlord to eject

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his tenant otherwise than in accordance with the provisions of this Act. Section 155 prescribes that (1) a suit for the ejectment of a tenant shall not be entertained unless the landlord has served a notice on the tenant specifying the particular misuse or breach requiring the tenant to remedy the same and to pay compensation for it and the tenant has failed to comply within a reasonable time with that request, (2) a decree in such suit shall order the amount of compensation or the remedy of the breach or misuse, and fix a time for paying the compensation, or remedying the breach or misuse.

Unfit for the purpose of tenancy:—See notes under s. 23. In a suit under this Act a tenant was sued for converting land admittedly let for agricultural purposes into an orchard, and he was held to have used it in a manner unfitting it for the purpose of tenancy and to be liable to ejectment.—Soman Gop *v.* Raghubar Ojha I.L.R., 24 Cal. 160; 1 C.W.N. 223.

Breach of condition consistent with the provision of this Act:—If the condition be inconsistent with the provisions of the Act, its breach will entail no consequences. But if the condition be consistent with the Act, its breach will subject the tenant to forfeiture. Hence if the occupancy-raiyat sublets and the subletting falls in with s. 85, no forfeiture will take place. No forfeiture will take place, if the landlord stood by and allowed the tenant to invest labour and capital without taking any action.—(Nayna Misra *v.* Rupikar, I. L. R., 9 Cal., 699; C. L. R., 569; 23 W.R., 298; 3 B. L. R., S. C., 18; 7 B. L.R., 159: 8 B. L. R.,App 51, 237.) Receipt of rent would be waiver of forfeiture.—(18 W. R,, 218 17 W. R., 29, 16 W. R., 103; 7 W. R., 132). A tenant who has erected buildings and effected improvements is not entitled to be paid their value on the determination of the tenancy merely because he has acted under the mistaken belief shared by his landlord that he had a larger interest in the property than he really had:—Jugmohan Das *v.* Pallonjee, I.L.R., 22 Bom. 1. If a tenant builds on his landlord's land he does not, in the absence of special circumstances, acquire any right to prevent the landlord from taking possession of the land and buildings when the tenancy has determined:—Ramsden *v.* Dyson, L.R. 1, H.L. 129; see also Naunilal *v.* Rameshwar, I.L.R., 16 All. 328; Shaik Husain *v.* Goverdhone Das, I.L.R., 20 Bom. 1; Ismail Khaa *v.* Jaigan Bibi, 4 C. W. N. 210: I. L. R., 27 Cal. 570, but where the land-owner stood by in silence while the tenant spent money on his land, *held*, that the plaintiff could not recover possession of the land, or require the removal of the buildings, without recouping the tenant the money he had expended:—Dattatraya *v.* Shridhur, I. L. R., 17, Bom. 736; where land was leased out for cultivation and the lessee changed the character of the holding by making improvements inconsistent with the purpose for which the land was leased out; *held* that the landlord having stood by and thereby caused a belief that the change had his approval, the lessee was entitled to compensation for his improvements:—Kunhammed *v.* Narayanan, I. L. R., 12 Mad. 320; see also Ravi Varmah *v.* Mothissen, 12 I. L. R., Mad. 323, note. A condition of forfeiture should not be extended beyond its words, unless, it is impossible to give a reasonable construction to the instrument in which it appears without doing so:—Ram Nursingh *v.* Dwarkanath, 23 W. R. 10. There is nothing incompatible in the two remedies of damages and forfeiture for breach

Damages and forfeiture.

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of the conditions of a lease :—Chunder Nath *v.* Sirdar Khan, 18 W. R. 218. Where there is a stipulation that the lessee would not transfer the land leased to him, *held* that when the land is sold against the will of the lessee by the act of a Court, the lessee could not be said to have voluntarily transferred his interest ;—Nilmadhub *v.* Narattam I. L. R. 17 Cal. 826 ; Tamaya *v.* Temapa I. L. R. 7 Bom. 262 ; Rungo Lal Mondol *v.* Abdul Ghaphur, I.L.R. 4 Cal. 314 ; and Subbaraya *v.* Krishna, I. L. R., 6 Mad. 159. A covenant by a lessee not to assign without the lessor's consent runs with the land, and applies to a re-assignment to the original lessee :—McEacharn *v.* Calton, L. R., App. Cas. (1902), p. 104 ; see also Doherty *v.* Allman, (1878) 3 App. Cas. 709.

Involuntary trasfer

Covenant not to transfer runs with land.

Where a covenant reserved to the lessor a power of re-entry, there being no mention of a similar power being reserved to his "heirs, successors of assigns," *held* that the lessor's vendees could take advantage of the covenant :—Krista Nath *v.* Brown, I. L. R., 14 Cal. 176.

Power of re-entry.

Though non-payment of rent did not bar the acquisition of an occupancy right, payment of rent was necessary to maintain it, and non-payment rendered a raiyat liable to be evicted.—(Narain Rai *v.* Opnit Misra I. L. R., 9 Cal., 304 ; 11 C. L. R. 417). Where a raiyat had been dispossessed and had failed to pay rent for five or six years, it was held in a suit by him for possession that he had no subsisting right of occupancy—Hem Chandra Chaudhri *v.* Chand Akund, I. L. R., 12 Cal., 115) : Masyatullah *v.* Nurzahan, I. L. R., 9 Cal., 808 ; 12 C. L. R., 389. In another case, however, it was said that mere non-payment of rent did not necessarily amount to a ferfeiture of right of occupancy, and in a case in which the decision in Hem Chandra Chaudhry *v.* Chand Akund was specially considered it was said that, though non-cultivation of the land, coupled with non-payment of the rent, might be sufficient to justify the conclusion that the tenant had relinquished the land, mere non-payment of rent was not in itself sufficient to show that there was no subsisting right of occupancy (Nilmani Dasi *v.* Sonatan Doshayi, I. L. R.. 15 Cal., 17). When the relation of landlord and tenant has once been proved to exist, mere non-payment, though for many years, is not sufficient to show that it has ceased. A tenant who alleges this must prove it, particularly if he is in possession of the land (Rango Lal Mandal *v.* Abdul Ghafur, I. L. R., 4 Cal., 314 ; 3 C. L. R., 119). Non-payment of the rent will not relieve an occupancy raiyat of his status of tenant so as to give him a title to the land (Poresh Narain Rai *v.* Kashi Chandra Talukdar, I. L. R., 4 Cal. 761).

Non-payment of rent.

Invalid transfer of occupancy right :—See notes under s. 23, pp. 132-136 ante, *Effect of transfer of holding by occupancy raiyat.* The sale or parting with the whole or part of holding is not a ground of forfeiture according to the Tenancy Act, and so where a raiyat had sold half his holding, but remained in possession of the other half, and when the whole of the rent of the holding had been deposited in the Collectorate to the credit of the landlord, it was held that he was not liable to be ejected.—Kabil Sardar *v.*

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Chandra Nath Chaudhri, I. L. R., 20 Cal., 590. See also Bansi Das *v.* Jagdip Narain Chaudhri, I. L. R., 24 Cal., 552; Durga Prasad Sen *v.* Daula Ghazi 1 C. W. N., 160; and Gozaffur Hussain *v.* Dalgleish, 1 C. W. N., 162; Kissen Persad Sahi *v.* Tripe, 2 C. W. N., cliv). But if a tenant transfers his holding, ceases to pay rent for it and accepts a new tenancy from the transferee, the landlord is entitled to eject the transferee as a trespasser.—(Kali Nath Chakravarti *v.* Upendra Chandra Chaudhri, I. L. R., 24 Cal., 212; 1 C. W. N., 163). See also Dwarka Nath Misra *v.* Harish Chandra, I. L. R., 4 Cal., 925; Sristidhar Biswas *v.* Madan Sardar, I. L. R., 9 Cal., 648; and Harihar Mukhurji *v.* Jadu Nath Ghosh, 7 W. R., 114, in which last mentioned case it was said that a tenant having a right of occupancy cannot create a tenure intermediate between himself and the zemindar.

Disclaimer:—Mr. Field in a note to his Digest, P. 17. observes: "Under English law a parol disclaimer of the landlord's title will effect a forfeiture of a tenancy from year to year or tenancy-at-will, if the landlord so elect; but will not effect a forfeiture of a lease for a term certain. But a disclaimer by matter of record, as for example when a tenant in answer to an action for rent denies the relation of landlord and tenant and sets up a title in himself or some third party will work a forfeiture of any lease. The principle of forfeiture by disclaimer, so far as it has yet been introduced into these provinces, rests (I believe) wholly upon case law; and the cases are not sufficiently numerous or exhaustive to have given form and shape to the principle in its application to this country. I think the principle is one which the Courts would properly apply in administering justice, equity and good conscience (see 4 Kent's Commentaries, 115): and I think it extremely desirable that the Legislature should define and regulate its application. Having regard to the circumstance of this country, I think mere words spoken or the claim by a tenant of a greater interest than he is entitled to (Woodfall, 283; Smith, 137) ought not to work a forfeiture; but I do not think that when a tenant in answer to a claim for rent or to avoid a legitimate enhancement, deliberately in Court denies the title of his real landlord and pretends to hold under a rival zemindar, and by way of making evidence in anticipation executes a registered kabuliyat in favour of such rival zemindar, forfeiture of his right of occupancy or whatever other right he possesses is a reasonable and proper retribution. That such *mala fides* is too common— the Zimba system in Backergunge is a notorius instance— the experienced are aware and, I know no more effectual way of striking a blow at an evil generally complained of than by enacting a reasonable rule as to forfeiture by disclaimer. This rule should of course provide that waiver of forfeiture by distraint for, or receipt of, rent accruing after the forfeiture or by other conduct on the part of the landlord shewing that, being aware of the disclaimer, he had elected to waive it." The case law on this point has only recently taken a settled form. In the earlier decisions Judges were doubtful and observed that it is not settled law that such denial works a forfeiture of the tenancy.—(Mahomed Basiroollah *v.* Ahmed Ali, 22 W. R. 448; Sreemutty Ahulya *v.* Bhyrob, 25 W. R. 147.) A tenant's statement that he has a good title as against a person alleging himself to be the assignee of the original landlord, does not constitute a

Case law on disclaimer.

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forfeiture of the tenure in favour of the landlord or warrant the latter in suing for *khas* possession.—(Doorga Krishna *v.* Sree Banoo, 18 W. R. 465.) In all these cases, however, it seems to have been assumed that the law here allows forfeiture. In Satyabhama *v.* Krishna Chunder (I. L. R. 6 Cal 55) Garth C. J., observed: "The rule of the English law is that where, by matter of record, a tenant disclaims his landlord's title, and sets up an adverse title in himself or in some third party, he thereby forfeits his tenancy. But without laying down any absolute rule here with regard to forfeiture in such cases, we think we are clearly justified in a case of this kind in refusing to allow defendants to change the whole nature of their defence at the last moment, and to set up in a Court of Appeal a plea which they had directly and fraudulently repudiated in the Court below." *A*, a raiyat with rights of occupancy, in a rent suit brought against him by *B*, the purchaser of an *Aima mehal*, denied the existence of the relationship of landlord and tenant between himself and *B*, on the ground that the lands occupied by him were not included in the *Aimá mehal* purchased by *B*. *B's* rent suit having been dismissed for failure of evidence on this point, *B* afterwards brought a regular suit to evict *A* and for mesne profits. It was held that *A*, by denying the title of *B* in the rent suit, thereby forfeited his rights of occupancy, and became liable to eviction.—(Mozuharuddin *v.* Gobind Chunder, I. L. R., 6 Cal., 436.) "We may observes" said Tottenham, J., "that the doctrine of forfeiture is not entirely unknown to the law of landlord and tenant in Bengal, for section 85 of the Bengal Act VIII of 1869 distinctly provides for it in the event of the Collector being unable from the non-attendance of persons holding tenures and under-tenures, to ascertain them at the measurement of any lands under that section." In a suit brought to recover rent in 1877, the defendant set up his lakheraj title; this suit was dismissed. In 1880, in suit brought by the same plaintiff to obtain *khas* possession of the land question in the former suit against the same defendant and three others claiming under the same title as himself, the defence that the land was lakheraj was set up by all. It was held that the case fell within the principles of the case of Satyabhama *v.* Krishna Chundra, and that the plaintiff, who had successfully proved that he had collected rents from the predecessors of the defendants, were entitled to evict them as trespassers on their failure to prove their lakheraj title.—(Ishan Chundra *v.* Shama Churn, I. L. R., 10 Cal., 41). "No doubt," observes Norris J., "there are various rulings of this Court on this point, but it seems to us that the weight of authority is in favour of the view that when a tenant directly repudiates the relation of landlord and tenant and sets up an adverse title in himself, the landlord is entitled to take possession of the land, irrespective of the period during which the tenant may have been in possession." —(Shumsher Ali *v.* Doya Bibi, 8 C. L. R., 150). Compare also Ram Nuffur *v.* Dhol Gobind, 1 C. L. R., 421; Dabee Missa *v.* Mangur, 2 C. L. R., 208). See s. 25, *post*, pp. 139, 140. But it is doubtful whether, under the present Act, the doctrine of disclaimer can be enforced, against a permanent tenure-holder, fixed raiyat or an occupancy-raiyat, or a non-occupancy-raiyat, because ss. 10, 15, 25 and 44 of the Act specify the condition, under which the tenants can be ejected, and they provide that

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ejectment is not possible except under those conditions, and disclaimer is not one of such conditions. Mr. Ilbert's observations in the Legislative Council on this point also favour the same inference: "I cannot advise the Council to give legislative sanction to what may fairly be described as an obsolescent doctrine of English law. I will not call it an obsolete doctrine, because it still appears in the text-books. But I call it an obsolescent doctrine, because it is very rarely enforced, and when attempts are made to enforce it, the Courts regard it with disfavour and limits its application in every possible way. And it appears to me that the doctrine is even more dangerous in Bengal than it is in England. Owing to a variety of well-known circumstances, such as the fact that the raiyat usually does not derive his title from contract, to the comparative rarity of written agreements, to the absence of definite landmarks, and to the shifting from natural causes of such landmarks as exist, it is often a matter of extreme doubt whether the relation of landlord and tenant exists between two persons with respect to a particular land. And when the existence of such a relation is denied or questioned on either side, we are by no means entitled to assume that the grounds for denying or questioning it are fraudulent or improper. We have done our best, by various provisions of this bill, to lessen the number of excuses for alleging this doubt, and to provide for cases in which it is alleged in good faith. Thus, we have in s. 60 carried a step further the policy of the Bengal Registration Act by enacting that where rent is due to the proprietor, manager or mortgagee of an estate, the receipt of the person registered under the Land Registration Act, 1876, as proprietor, manager or mortgagee of that estate, or of his agent authorized on that behalf, shall be sufficient discharge for the rent, and the person liable for the rent shall not be entitled to plead in defence to a claim by the person so registered that the rent is due to any third person. We have by another section (s. 61) enabled a tenant, who entertains a *bonâ fide* doubt as to the person entitled to his rent, to pay the rent into Court. We have said that when a person is sued for rent and admits that rent is due, but pleads that it is due to a third person, the plea is not to be entertained except on terms of payment into Court (s. 150). And we have endeavoured to help the landlord who is in doubt whether to treat an occupant as a tenant or as a trespasser, by authorizing him to claim, in a suit for trespass, as alternative relief, a declaration that the defendant is liable to pay for the land rent at a rate to be fixed by the Court (s. 157). By these and other provisions we have endeavoured to assist, as far as is practicable, both landlords and tenants; and I am not prepared to go further." In Debiruddi and other *v.* Abdur Rahim I. L. R., 17 Cal., 196, Wilson and Rampini, JJ., followed the decisions of Satyabhama Dasi (I. L. R., 6 Cal., 55) and Ishan Chunder Chatterji I. L. R., 10 Cal., 41, and *held* that a denial by a tenant of the title of his landlord before the Bengal Tenancy Act came into operation created a forfeiture, but that since the passing of that Act, in any case to which it applies there cannot be any eviction on the ground of forfeiture incurred by denying the title of of the landlord, that not being a ground enumerated in the Act and therefore expressly excluded by s. 178. That case, however, was a case under the old Acts, and before the Bengal Tenancy Act came into operation; the opinion of the learned Judges with

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regard to what the law is under the Bengal Tenancy Act is an *obitur dictum* and amounts to a semble. In Dhora Kairi *v.* Ram Jiwan Kairi I. L. R., 20 Cal., 101, which was a case under the Bengal Tenancy Act, their Lordships however followed the decision of Debiruddi *v.* Abdur Rahim I. L. R., 17 Cal., 196, and held that in all cases to which the Bengal Tenancy Act applies there can be no eviction on the ground of forfeiture incurred by denying the title of the landlord. See Sheik Nizamuddin *v.* Momtaguddin, 5 C. W. N. 263; but a denial before the Bengal Tenancy Act was passed operates as a forfeiture of the tenant's right whether the case is governed by the Transfer of Property Act or by the ordinary Rent Law which was in force before the passing of the Bengal Tenancy Act—Annada Chandra *v.* Abrahim Soleman, 4 C. W. N. 42; the rule that a denial of the relationship of landlord and tenant does not entail a forfeiture does not apply where the denial is given effect to by a decree of Court. The plaintiff, owner of a durputni taluk, had sued defendant No. 1 for rent; the defendant having denied plaintiff's title, the plaintiff withdrew the suit and a subsequent suit for rent which was met by the same defence was dismissed on the ground that there was no relationship of landlord and tenant; plaintiff then brought a suit for khas possession and defendant again denied relationship of landlord and tenant; it was held that plaintiff was entitled to khas possession, and the rule that the denial of relationship of landlord and tenant does not entail a forfeiture did not apply to the case.—Nilmadhub *v.* Anantram, 2 C. W. N. 755

Limitation:—The period of limitation for ejectment under clause (a) of this section is two years under art. 32, Sch. II of the Limitation Act (Soman Gop *v.* Raghabar Ojha, I. L. R., 24 Cal., 160; 1 C. W. N., 223; Sarup Das *v.* Jageswar Rai, I. L. R., 26 Cal., 564; 3 C. W. N., 464). The period of limitation for a suit for ejectment under clause (b) of this section is one year under art. 1, Sch. III, appended to this Act. A suit to compel the defendant to remove trees from certain land leased to him for agricultural purposes is governed by art 120 Sch. II of Limitation Act:—Gunesh *v.* Gondour, I. L. R., 9 Cal. 147; Kedar Nath *v.* Sriratun, I. L. R., 6 Cal. 34.

Devolution of occupancy rignt on death.

26. If a raiyat dies intestate in respect of a right of occupancy, it shall, subject to any custom to the contrary, descend in the same manner as other immovable property; provided that, in any case in which under the law of inheritance to which the raiyat is subject, his other property goes to the Crown, his right of occupancy shall be extinguished.

Heritable:—The occupancy right is thus expressly made heritable. Under the old Acts in Ajodhya Pershad *v.* Musst. Imambandi, 7 W. R. 528 (F. B.), the Chief Justice (Sir Barnes Peacock) questioned if an occupancy right is necessarily heritable; so in Jateeram Surma *v.* Mungloo Surma, 8 W. R., 60, a distant relation of the deceased raiyat was not allowed to succeed by inheritance, and set aside the

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arrangement by the zemindar letting the lands to another tenant. These questions are now settled otherwise by positive law. If a custom be pleaded that it is not heritable, the onus is on the person alleging it. The heirs of the last recorded tenant with respect to an occupancy holding are entitled to claim recognition from the landlord, and if the latter ignoring them, brings a suit for arrears of rent and in execution thereof sells the holding, the right of the former is not affected. So where, upon the death of the last recorded tenant, none of his heirs had his name recorded in the landlord's office, but they held the land and went on paying the rent and obtained separate rent receipts for some years, until recently, when a rent suit was brought against two of them only, and the jumma was sold in execution of the decree, *held* that after having accepted rent from all the heirs the landlord had no right to ignore some of them, and that the sale did not pass the entire jumma but only the right, title and interest of the judgment debtors:—Annada Kumar *v.* Hari Dass, 4 C. W. N. 608: I. L. R. 27 Cal. 545. The Calcutta High Court has held that the heirs of a deceased occupancy-raiyat are liable for the rent of the holding whether they hold it or not, unless they have surrendered it or "done something from which a surrender in the terms of section 86 can be presumed." Non-cultivation of the land would not necessarily amount to a surrender.—Peary Mohan *v.* Kumar Chander, I. L. R., 19 Cal. 790. This is at variance with the view taken by the Allahabad High Court which seems to hold that before the heirs of a deceased occupancy-raiyat can be made liable it must be shown that they have accepted the tenancy or attorned to the landlord.—Lekraj Singh *v.* Rai Singh, I. L. R., 14 All. 381. There cannot be a partial acceptance or renunciation of an inheritance, nor can one of several heirs accept a part only of an inheritance to the prejudice of the other heirs and of the creditors of the deceased. An acceptance in part has the effect of an acceptance of the whole and carries with it the same liability. If a person accepts the inheritance in whole or in part he is bound to discharge the liabilities which attach to the late tenants from whom he inherits, unless he can prove that he has since made a formal surrender of the holding to the landlord:—Mozam Hassain *v.* Bhouddin, 5 C. W. N. 190.

Liability of the heirs.

Partial acceptance of Inheritance.

Right to bequeath.—It is to be presumed that the right of an occupancy-raiyat to devise his holding by will stands in the same position as his right to make any other alienation, and would be dependent on local usage.—Vide cl. (d) subsection (3) of s. 178 *post*.

Enhancement of Rent.

27. The rent for the time being payable by an occupancy-raiyat shall be presumed to be fair and equitable until the contrary is proved.

Presumption as to fair and equitable rent.

A raiyat with a right of occupancy is entitled to hold his land upon paying a fair and equitable rent. The law presumes that the rent at present paid is fair and equit-

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able, and this rent cannot be enhanced except after service of notice under section 14, and upon one of the grounds stated in section 18 of Act VIII of 1869 (B. C.)—(Issur Ghose *v.* Hills, W. R. Sp. 148; Thakurani Dasi *v.* Bissessar Mukerji, B. L. R. 1 Sup. Vol., 202; 3 W. R. (Act X), 110). For further explanation see sections 35 and 24.

For the time being payable:—The benefit of the presumption will always be in favor of the tenant. This section does not purport to protect the landlord but the tenant; when therefore the tenant has been paying a higher rent than his old, and the landlord wants to stop him by setting up a presumption under this section, the time must not be less than three years. See proviso I of Section 29 and notes.

Restriction on enhancement of money-rents.

28. Where an occupancy-raiyat pays his rent in money, his rent shall not be enhanced except as provided by this Act.

Enhancement of produce rent:—But when an occupancy raiyat pays rent in kind his rent can be enhanced otherwise than by this Act. The provisions of enhancement in the present chapter apply to money-rents only. Is enhancement of *bhaoli* rent possible under the general principles of laws, *i. e.*, otherwise than under this Act? I think so; s. 178 places no restriction on enhancement of rent in kind.—See Thakur Persad *v.* Mahomed Bakir, 8 W. R., 170.

Enhancement of rent by contract.

29. The money-rent of an occupancy-raiyat may be enhanced by contract, subject to the following conditions:

(*a*) the contract must be in writing and registered;

(*b*) the rent must not be enhanced so as to exceed by more than two annas in the rupee the rent previously payable by the raiyat;

(*c*) the rent fixed by the contract shall not be liable to enhancement during a term of fifteen years from the date of the contract:

Provided as follows—

(i) Nothing in clause (*a*) shall prevent a landlord from recovering rent at the rate at which it has been actually paid for a continuous period of not less than three years immediately preceding the period for which the rent is claimed.

(ii) Nothing in clause (*b*) shall apply to a contract by which a raiyat binds himself to pay an enhanced rent in consideration of an improvement which has been or is to be effected in respect of the holding

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by, or at the expense of, his landlord, and to the benefit of which the raiyat is not otherwise entitled; but an enhanced rent fixed by such a contract shall be payable only when the improvement has been effected, and, except when the raiyat is chargeable with default in respect of the improvement, only so long as the improvement exists and substantially produces its estimated effect in respect of the holding.

(iii) When a raiyat has held his land at a specially low rate of rent in consideration of cultivating a particular crop for the convenience of the landlord, nothing in clause (*b*) shall prevent the raiyat from agreeing in consideration of his being released from the obligation of cultivating that crop, to pay such rent as he may deem fair and equitable.

Enhancement possible by contract or suit.

This Act provides for the enhancement of money rent only and in two ways, *viz.* by contract or by suit, and under section 28 enhancement of money rent is not possible except in these two ways. The contract again must be (*a*) in writing and registered, which is subject to proviso (i), (*b*) must not allow an enhancement of more than two annas in a rupee, *i. e.* of one-eighth of the existing rent which is subject to provisoes (ii and iii), and (*c*) shall not be liable to a further enhancement during the fifteen years next. The fifteen years rule applies also to enhancement by suit, see section 37. The first of these conditions make an addition to sections 17, 18, of the Registration Act (III of 1877). A lease at an enhanced rent for less than a year is exempt for registration under clause (*c*) of section 18, but would now be registrable under the present section. The proviso attached to this condition is that if the raiyat had been actually paying rent at a higher rate continuously for three years or more he would be precluded from pleading that the contract was not registered or in writing. So that If a landlord can peacefully realise a higher rent for at least three years, this provision will not affect him. The proviso (i) implies that if the raiyat had been actually paying a higher rent for less than three years, the landlord will not be entitled to claim it, unless he has shown that the raiyat made a contract in writing and registered it. This however, is inconsistent with section 27 which provides that the rent for the time being payable shall be presumed to be fair and equitable. If a raiyat had been paying a rent (higher than his former rent) for two years, under section 27 of the Act, that rent ought to be presumed to be fair and equitable. Condition (*a*) of section 29 modifies this provision by providing that the term during which the higher rent is paid must not be less than three years. Section 27, however, is meant for the benefit and protection of the tenant; the presumption will therefore always arise in his favour. If the landlord wants to

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avail himself of the presumption as against the raiyat, he must show that the higher rent has been paid at least for three years. Condition (*b*) controls the whole section. Even if the contract be in writing and registered, the enhancement must not be more than two annas in a rupee; where however a higher rent which exceeds this limit is stipulated by a written and registered contract, it will operate only to the extent of the limit. This condition will not apply when an improvement has been made by the landlord to the benefit of which the raiyat is not entitled except by paying an enhanced rent, and the improvement must be substantially effective—See sections 76 to 83 of the Act. This condition is also subject to proviso (*iii*)—See section 56 of Regulation III of 1793. Condition (*c*) relates only to the after-effect of the contract. Whatever be the term of the contract, for the next fifteen years no further enhancement is possible. It is doubtful, however, if this condition will avail when a contract of progressive enhancement is made. Suppose the contract is that a higher rent shall be paid for ten years, and then a still more higher rent for another ten years, and so on. Will the bar of fifteen years apply? The wording of the section will not make such a contract inoperative, though it must be said that a contract of this nature would be against the spirit of law. "It is considered that it would be destructive of the objects of the Bill if occupancy raiyats were left perfectly free to deprive themselves by their contracts of the right to hold at fair and equitable rates secured to them by the law. But on the other hand, absolutely to prevent such contracts, it is thought, involve too great an interference with the freedom of the parties. A middle course has accordingly been adopted."—(S. C. B. III.) The proviso has been added at the instance of the Hon'ble Mr. Evans.

To what cases this section does not apply:—This section applies only to cases of increase in the rate of rent, which is ordinarily designated "enhancement of rent." This section has no application to increase in the rent by reason of increase in area which is not called "enhancement of rent" but is styled "alteration of rent" in this Act:—Satis chandra *v.* Kabiruddin, I. L. R., 26 Cal. 233; when the contract was to pay a rental agreed upon by the parties in settlement of a dispute between them as to what had been in fact the rental of the land held by the tenant, *held* that this agreement is not within the provisions of this section at all:—Sheo Sahoy *v.* Ram Rachia, I. L. R., 18 Cal. 333. This case was followed in the case of Nath Singh *v.* Damri Singh, I. L. R., 28 Cal. 90, where it was held that where the kabuliyat is not a mere agreement to enhance the rent, but is an agreement to settle *bonâ-fide* disputes and differences, this section will not apply. When the section says that the money rent may be enhanced by contract in writing and registered, it evidently means to refer to enhancement after the promulgation of the Bengal Tenancy Act; a contract by which rent was enhanced before the passing of the Act does not fall within this section and therefore such a contract is no bar to an enhancement during the period of fifteen years from the date thereof, as contemplated by cl. (*c*) of

Alteration of area.

Agreement in settlement of dispute.

Contract before the passing of this Act.

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this section.—Mothura Mohun *v.* Mati Sarkar, I. L. R., 25 Cal. 781. But see Bepin Bihari *v.* Krishna Dhone, I. L. R., 32 Cal. 395. S. 29 cl. (*b*) has no retrospective effect and does not apply to a kabuliyat executed before the passing of this Act :—Tejendra Narain *v.* Bakai Sing, I. L. R., 22 Cal. 658.

Clause (a) :—A widow may sign a kabuliyat on behalf of her minor son agreeing to pay enhanced rent, and the son on attaining full age and entering on possession of the tenancy is bound by the kabuliyat (Watson & Co. *v.* Sham Lall Mitra, I. L. .R, 15 Cal., 8.) One of the holders of an under-tenure having agreed with his immediate landlord that an enhanced rent should be paid in respect of the tenure, the enhanced rent fixed was paid for some years, when default being made, the landlord brought a suit against all the joint-holders for arrears of rent at the enhanced rate. *Held*, that the landlord was entitled to rent at the rate claimed, until circumstances were shown from which it would follow that the rate claimed was not the fair and equitable rate payable. *Held*, further, that the holder by whom the agreement to pay the enhanced rent was made, was not solely liable to pay that rent, but that the tenure was also liable, and that if it could be shown that the other holders had acquiesced in the agreement they were otherwise responsible.—(Burhunnuddi *v.* Mohan Chunder, 8 C. L. R., 511.)

Clause (b) :—A contract which contravenes the provisions of this clause is wholly void. It is not divisible, so that a decree for enhanced rent up to the extent allowed by law cannot be given (Krishna Dhan Ghosh *v.* Brojo Gobinda Rai, I. L. R., 24 Cal., 895; 1 C. W. N., 442).

Proviso (1) :—In the case of Mothura Mohan Lahiri *v.* Mati Sarkar (I. L. R., 25 Cal., 781), cited above, it was held that having regard to the proviso (1) of s. 29 and the provisions of s. 27, the plaintiff would at any rate, (*i.e.*, failing the kabuliyat), be entitled to recover rent at the rate paid by the defendant for more than three years. A recent Full Bench has held that this case was wrongly decided and that Proviso, (i) to s. 29 does not control cl. (b) of that section. The landlord of an occupancy raiyat cannot therefore recover rent at the rate at which it has been paid for a continuous period for which rent is claimed, if such rent exceeds by more than 2 ans. in the rupee the rent previously paid by the raiyat.—Bepin Behari *v.* Krishna Dhone I.L.R., 32 Cal. 395; 9 C. W. N., 265. The rate contemplated by proviso (i) is not the average rate.—*Ibid.* Where tenants after mortgaging their land agree to pay, and for two or three years pay, an increased rent to their landlord who is ignorant of the mortgage, and the property is afterwards sold in execution of the mortgage debt, the zemindar is entitled to recover the increased rent from the tenants or from the party who has succeeded to their rights and interests (Mitrajit Singh *v.* Raj Chandra Rai, 15 W. R., 448).

Enhancement of rent by suit.

30. The landlord of a holding held at a money-rent by an occupancy-raiyat may, subject to the provisions of this Act, institute a suit to enhance the rent on one or more of the following grounds, (namely) :—

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(*a*) that the rate of rent paid by the raiyat is below the prevailing rate paid by occupancy-raiyats for land of a similar description and with similar advantages in the same village "or in the neighbouring villages" (Act III B. C. of 1898) and that there is no sufficient reason for holding at so low a rate;

(*b*) that there has been a rise in the average local prices of staple food-crops during the currency of the present rent;

(*c*) that the productive powers of the land held by the raiyat have been increased by an improvement effected by, or at the expense of, the landlord during the currency of the present rent;

(*d*) that the productive powers of the land held by the raiyat have been increased by fluvial action.

Explanation.—"Fluvial action" includes a change in the course of a river rendering irrigation from the river practicable, when it was not previously practicable.

Extended to Orrisa (Not. June 27th 1892 and November 5, 1898). The old section ran thus: "No raiyat having a right of occupancy shall be liable to an enhancement of the rent previously paid by him, except on some one of the following grounds, namely: —that the rate of rent paid by such raiyat is below the prevailing rate payable by the same class of raiyats for land of a similar description and with similar advantages in the places adjacent; that the value of the produce or the productive powers of the land have been increased otherwise than by the agency or at the expense of the raiyat; that the quantity of land held by the raiyat has been proved by measurement to be greater than the quantity for which rent has been previously paid by him."—(Section 17 of Act X of 1859 and section 18 of Act 1869, B. C.)

The landlord of a holding:—'Landlord' under its definition (s. 3 (4) is a person immediately under whom a tenant holds, and includes the Government. It therefore includes an ijaradar, or dur-ijaradar. Where a party took an ijara estate while certain raiyats were under notice of enhancement, but neither contributed nor offered to contribute necessary expenses, he was held not entitled to share in the increased rents.—(J. R. Savi *v.* The Collector of Jessore. 17 W. R., 382.) Indeed under the old law it was held that under s. 13 of Act X of 1859, and s. 14 of Act VIII of 1869 (B. C.), when any land is in the farm of a lessee, the notice of enhancement must issue from the farmer, as the person to whom the rent is payable.—(Binodlal *v.* Mackenzie, 3

The ijaradar.

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W. R., (Act X), 157; Hemchunder *v.* Purno Chunder, 3 W. R., (Act X), 162; Doorga *v.* Shyamjha, 8 W. R., 72; Watson & Co. *v.* Nil Kant, 10 W. R., 381); and this notwithstanding an agreement between the zemindar and the farmer by which the zemindar reserved to himself the right of serving notice of enhancement.—(Doorga Charan *v.* Goluk Chunder, 23 W. R., 228.) So a person by whom notice of enhancement was served at the time when the rent was payable to him is entitled, either entirely by a sale or partially by a lease, to convey to the purchaser or lessee the rent with the incident of its being liable to enhancement under that notice. The purchaser or lessee is not obliged to serve fresh notice of enhancement :—(Kharkee Roy *v.* Furzundali Khan, 18 W. R., 144.) An ijaradar is entitled to enhance the rent of raiyats holding under him, where there is no condition or stipulation in his lease precluding him from so doing.—(Doorga Persad *v.* Joynarain, I. L. R., 2 Cal., 474; see I. L. R., 3 Bom., 23.) But not a manager appointed under s. 243 of Act VIII of 1859 who is appointed merely to collect rent and other receipts and profits of the land, to carry on the existing state of affairs as the proprietor had been doing and has no power to issue notice of enhancement.—(Khetter Mohun *v.* Wells, I. L. R., 8 Cal., 719; 11 C. L. R., 13.) But manager appointed under s. 95 of this Act may sue for enhancement of rent,—s. 98 (3). A Hindu widow in possession of her husband's estate, whether in her own right as widow or as guardian of her minor son, is entitled to sue for enhancement. Surja Kanta Acharjya *v.* Hemanta Kumari, I. L. R., 20 Cal. 498, P. C. The 'landlord' in this section means a landlord of the entire 16 annas. Fractional co-sharers cannot maintain such an action, even where the *raiyat* has executed a *kabuliyat* in favour of the co-sharer landlord agreeing to pay his share of the rent separately. The enhancement must be made in accordance with law, and upon a properly constituted suit.—Gopal Chandra *v.* Umesh Narain, I. L. R. 17 Cal., 695. The term " holding " as used in this section means an entire holding; an agreement by a tenant with one of several joint-landlords to pay his share of the rent separately does not constitute a separate tenancy under him; so where a co-sharer landlord sued for enhancement of rent on the basis of such an agreement, *held* that such a suit was not maintainable even when it contained a stipulation for such enhancement—Baidya Nath *v.* Sheikh Jhin, 2 C. W. N. 44; see also Haribole *v.* Tasimuddin, 2 C. W. N. 680, where it is held that this section does not apply to an enhancement of rent of an undivided share of lands comprising a holding, as it does not fall within the definition of a holding given in this Act. See notes under s. 3, cl. (9).

Manager.

Hindu Widow.

Of the holding held by an occupancy-raiyat:—'Holding' is a parcel of land held by a raiyat, and a raiyat is one who has acquired a right to hold land for the purpose of cultivation (s. 5). This section will not, therefore, apparently apply to land which has been let on lease for the erection of a school or church—(Rani Shuroomya *v.* Blumhardt, 9 W. R., 552.) Nor to land situated in a town or used for building purposes, and not for agricultural or horticultural purposes.—Madan Mohan *v.* Stalkart, 9 B.L.R., 79;

The section applies only to raiyats and agricultural land.

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17 W. R., 441; Rani Durga Sundari *v.* Bibi Omdatunnissa, 9 B. L. R., 101; 17 W. R., 151; 18 W.R., 235, F. B.; Brojo Nath *v.* Lowther, 9 B. L. R., 121; 17 W.R., 183; Kali Mohan *v.* Kali Kristo, 11 W. R., 183; Kali Kishen *v.* Srimati Janoki, 8 W.R., 200. Maharajah Sutees Chunder *v.* Huri Mohon, 1 Hay, 275.) See notes under s. 20. *Bastoo* land however, upon which the raiyat's house is built, does not fall within the definition of land for building purposes and is consequently liable to enhancement under this section.—(Naimuddi *v.* Scott Moncrieff, 3 B.L.R. A. C. 283; 12 W.R., 140). In delivering his judgment in this case, Macpherson, J., observed: "It is true that some kinds of *bastoo* lands cannot be enhanced under Act X of 1859, or Act VIII of 1869 (B.C.), *e.g.*, land in a town on which a house is built. But it is equally true that some kinds of *bastoo* land are liable to enhancement, and do come under the provisions of the Rent Law, *e.g.*, land on which stands the house of a raiyat who is engaged in cultivating the surrounding lands. The case of a raiyat building a group of a few huts upon a small piece of ground, used by him as his residence and cowshed, &c., and keeping a portion of lands as *oothan* (courtyard of his house) is quite different from the case of an indigo or silk manufacturer, who may have erected a large number of buildings scattered over a large area of ground. In the former case the whole of the raiyats' residence with *oothan* is assessed at *bastoo* rates; but in the latter case only those blocks of land upon which different parts of factories, such as vats and other buildings are situated, are assessable at *bastoo* rates—Premchand *v.* Brown, 6 W.R., Act X, 92. See sub-cl. (*f*) of cl. (2) s. 76, and also cl. (1) of s. 77. Where a lease was granted for building purposes by a person with a limited interest in the estate, or a life-tenant, the lessee is not thereby relieved from enhancement claimed by a party succeeding to the life-tenant.—(Joggessur *v.* Rajendra, 5 W. R., Act X. 34.) The rent of a julkur is not liable to enhancement under this section, as no right of occupancy can be acquried in julkurs and tanks (see notes under s. 20). The Rent Law does not entitle a lessor to enhance the rent payable from a lessee on account of a right leased to the latter to collect lac insects from trees growing in former's land.—Gopal Singh *v.* Sum Kuri, 23 W. R., 458.) No suit for *kabuliyat* or *surkhut* will lie under Act VIII of 1869 (B. C.) in the case of a house situated in a town, but the lessee of a share of a house has a right to raise the rent of such share after due notice, and to eject the tenant if he refuses to pay the higher rent. "The suit as it has been brought," observed Macpherson, J., "is in the nature of a suit for *kabuliyat*—the plaintiff requiring the defendant to execute a *surkhut* as regards two-thirds of the house. But the house being in the town of Gya, the provisions of Act VIII of 1869 (B. C.) do not apply to the case, and no suit for *kabuliyat* or *surkhut* will lie. The best course for the plaintiff will be to serve a fresh and distinct notice on the defendant, that from a date named rent will be payable by him at a certain increased rate, and that if he fails to pay at that rate he must quit the premises."—(Ramlal *v.* Chummon, 24 W. R. 271.) Plaintiff having served notice of enhancement in terms of s. 14 of the Rent Act VIII of 1869 (B. C.) of certain lands held by defendants on which reservoirs and buildings, for the purpose of silk filature, had been constructed, brought a suit

Bastoo and udbastoo.

House-rent.

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for such enhancement under Act VIII of 1859. The lower Court dismissed the suit, in spite of a statement in the plaint that the suit was brought under the latter Act on the ground that the rent of the tenure was not enhanceable under the Rent Law. *Held*, that the lower Court ought not to have refused to decide the suit in the form in which it was brought, but ought to have inquired as to the nature of the tenancy, whether it was held at a fixed rate or not. *Held* further that, although the suit was brought under the general law of procedure, the notice was not vitiated by the fact that the reasons assigned for the enhancement were reasons taken from the Rent Law applicable to the case of raiyats possessing rights of occupancy.—Kumar Paresh Narain *v.* Robert Watson & Co., 3 C. L. R., 543.) *In re* The Collector of Monghyr *v.* Hakim Madur Bux, 25 W. R., 136, it was laid down that the mere fact that a building has been erected on a piece of land with the consent of the proprietor, does not give the occupant a right to hold the land perpetually at the same rate. So *in re* Ranee Durga Sundari *v.* Bibi Omdatunnisa, 18 W. R., 235, it was held that the erection of a building upon the land with the consent of the landlord does not give to the occupant a right to hold the land perpetually at the same rent. A suit for enhancement of rent, in pursuance of a notice to pay the enhanced rent or quit the land within three months, cannot be maintained where the land in question was originally let by the ancestor of the defendants for building purposes.—(Purno Chunder *v.* Sadat Ali, 2 C. L. R., 31). When the Collector has issued due notice of enhancement, under s. 14 of Reg. VII of 1822, of the jumma of lands situate in town and subject to that regulation, and on failure by the tenant to accept a settlement at the revised rate an action in ejectment has been brought, the Civil Court has no power to consider whether the new rate of assessment is reasonable, or in any way to interfere with the amount of the revised jumma as fixed by the Collector. Where the tenant refuses to accept a revised settlement under such circumstances, he is to be entitled to a reasonable time within which to remove a house standing upon the lands in question.—(Ram Chunder *v.* The Government, 6 C. L. R., 365.) The Act defines "a settled raiyat" (s. 20), and an occupancy-right (s. 21), but it does not define an occupancy-raiyat. But the settled raiyat is an occupancy-raiyat under sub-cl. (*b*) of cl. (3), s. 4. Comparing ss. 20 and 21 with this sub-clause, it seems that a settled raiyat is a convertible term with an occupancy-raiyat. This section (s. 30) applies only to occupancy-raiyats; it does not apply to talukdars or holders of intermediate tenures.—Huronath *v.* Bindubasini, 3 W. R., Act X, 26; Nava Kishsore *v.* Pandul, 8 W. R. 312; Panioty *v.* Juggut Chunder, 9 W. R., 379; Budurinissa *v.* Chundra Kumar, 10 W. R., 454). Nor will it apparently apply to a raiyat without a right of occupancy,—(Chundra Kumar *v.* Azeemuddin, 14 W.R. 100.) A tenant's right of occupancy is implied in a suit for enhancement—1 W. R., 86 (3 R. J. P. J., 186.) By serving notice on defendant under the terms of s. 17, Act X of 1859, plaintiff was held to have treated defendant as a raiyat, having a right of occupancy, and to be debarred from suing him for enhancement of rent as an under tenant or middleman.—Chandra Nath *v.* Shotooram,

Notice of suit for enhancement implies an occupancy right.

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12 W. R., 343.) "I should not," says Markby, J., in another case, "venture to express a final opinion. It does, however, appear to me that where a zemindar comes in and gives a notice of enhancement to a tenant on the first of the grounds stated in section 17, Act X of 1859, he does treat him as a raiyat having a right of occupancy." —(Thakoor Dutt *v.* Gopal Singh, 14 W. R., 4.) The same argument applies to a suit for enhancement.

Held at money-rent:—The old Act did not characterise the nature of 'rent' and s. 18 of Act VIII of 1869, B.C. applied both to rent reserved in money as well as rent in kind. Both the old and the new section, however, use the words 'enhancement' and 'enhance,' which do not ordinarily include commutation or variation of rent. In granting an enhancement the same standard ought to be used, *e.g*, when a landlord received rent-in-kind at the ratio of 8 : 8, he might sue under s. 18 of Act VIII of 1869 (B. C.) to raise his proportion to 9 : 7 or when he received rent in money, he might sue for a higher rent in money; but the wording of that section precluded the idea that a landlord receiving rent-in-kind might sue under that section to convert his rent to the prevailing rent in money, or that a landlord receiving rent in money might sue under it to convert it to the prevailing *bhaoli* rate. It has been, however, held that a zemindar may sue to convert rents paid in kind into rents paid in money under s. 18 of Act VIII of 1869. This question first arose in the case of Yakub Hossein *v.* Sheik Chowdry Wahid Ali, 4 W. R. (Act X) 23. The two Judges (Bayley and E. Jackson, JJ.) differed in opinion, and the case was to laid before a third Judge (Trevor, J.) He held that the intention of the laws of this country was to discourage rent-in-kind, and encourage the introduction of money-rent. Hence when the landlord sued to convert his rent-in-kind into the prevailing money-rent, the Courts of Justice ought to encourage such a suit, This decision was followed in Thakur Persad *v.* Nowab Syud Mahomed Baker, 8 W. R., 170.

The section applies only where the holding is nugdi or held at money-rent.

The same standard of Rent should be used.

Is conversion of rent-in-kind into money-rent or vice versa feasible under this section?

Institute a suit to enhance rent:—This section should be read with s. 154 of the Act. The repeal of the provisions about the notice of enhancement and the wordings of the present section giving a right to institute a suit to enhance rent, with s. 154, clearly lay down that notice of enhancement will not now be necessary. This makes a great change in the law with regard to enhancement suits.

Notice of enhancement of rent not necessary.

"We have dispensed with the notice of enhancement which is required by the present law, and which was also required by the old Regulation in force before 1859. Such a large percentage of enhancement cases have failed, because it was not found that the notice had been served, or, because the notice was defective in form, that it has appeared to us highly expedient to do away with a detail, the practical result of which has been to delay and impede a decision of the real question at issue between the parties. We have accordingly made the institution of the enhancement suit to be notice to the tenant. Under the existing law the enhancement notice must be served

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in districts or parts of districts whether the Fusli year prevails in or before the month of Jyte, and in districts or parts of districts where the Bengalee year prevails in or before the month of Pous. The very proper and reasonable object of this is, that the raiyat may know the fact of increased rent being claimed in such time as will enable him to relinquish the land before the end of the agricultural year, if he is unwilling to hold it at an increased rent. If the notice is not served in or before the month of Jyte or Pous, it will not affect the rent of the following year. We have effected the same object by requiring the plaint, in order to affect the rent of the following year, to be presented in districts in which the Fusli or Umli year prevails in or before the month of Bysakh, and in districts in which the Bengalee year prevails in or before the month of Aghan, *i.e.*, one month earlier than the time for service of the present notice. This will enable the summons in the suit to be served at or before the time at which the notice is now served, and the tenant will therefore have an equal facility to relinquish the land before the close of the agricultural year, if he is unwilling to continue to hold it at an increased rent (s. 96 of the Draft Bill)." (R. C., R. I.) Section 96 of the Rent Commission Bill has been revised and modified to s. 154 of the Act.

Clause (a) : Prevailing rate:—The expression "prevailing rate" has now been defined in section 31A, subsection (1), introduced by Act III B. C. of 1898. The leading case on this point is that of Sadoo Sing *v.* Ramanugralal, 9 W. R. 83 and it held that the term "prevailing rate" means the rate generally prevalent, or the rate paid by the majority of the raiyats in the neighbourhood. The word "prevailing" observed in this case, Mitter, J., "used in section 17 must have some definite meaning attached to it. It means the rate generally prevalent, or the rate paid by the majority of the raiyats in the neighbourhood. Now the evidence of twenty raiyats (for that is the number referred to in the present case) simply showing that they paid their rents at the rate of Rs. 3 per bigha does not go to prove the *prevailing* rate or the rate paid by the majority of the raiyats. I do not mean to say that all the raiyats in the neighbourhood are to be examined, and then the rate paid by the majority of them is to be found out. But I do mean to say that the evidence given must purpot to show the rate paid by the majority; otherwise it cannot be said that the prevailing rate has been established. In the case before us, the Ameen had examined thirty other raiyats who deposed that the rate of rent prevailing was one rupee per bigha, or in other words, the same as the rate at which the special appellant has been hitherto paying his rent. Against the evidence of twenty raiyats deposing that they paid their rent at a particular rate, there was the evidence of thirty raiyats who deposed to a different rate already examined by the Ameen, besides that of others whom he did not examine. I cannot understand how the fact of these raiyats having been subsequently served by the respondent with similar notices of enhancement can affect their eligibility as witness in the cause. Suppose that a village consists of a hundred raiyats, all belonging to the same class, and all holding lands of a similar description, and with similar advantages of situation; suppose also that ninety-one of these raiyats paid at the rate of Re. 1 per bigha, and the remaining nine at the rate of Rs. 3 per bigha. Suppose

Prevailing rate.

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then that the proprietor of the village, being desirous of enhancing the rents of the ninety-one raiyats above referred to, serves them with notices of enhancement, and institutes his suit against any one of them as a first experiment, the only ground of enhancement assigned being that the rate paid by him is below the prevailing rate, can it be said that the evidence of the ninety witnesses is to go for nothing, and that the prevailing rate must be found to be Rs. 3 per bigha upon the evidence of the nine remaining raiyats who pay at that rate? Such a proposition would be absurd upon the face of it. Similarly it might be argued that where ninety-one raiyats are sued for enhancement of rent, the evidence of forty witnesses deposing simply that *they* paid their rents at a higher rate, will not establish a prevailing rate. Another interesting question may arise, *e g.*, whether there may not be more than one prevailing rate? Under the General Clauses' Act (Act I of 1868), clause (2) of section 2, words in the singular shall include the plural. Therefore, though the word 'prevailing rate' is used in the singular, it may include the plural. Hence in a village consisting of a hundred raiyats, if forty pay rent at the rate of Rs. 3, and forty at the rate of Rs. 5, though the rent of none of the former might be enhanced to Rs. 5, because that would not be the prevailing rate, the rent of the remaining twenty raiyats who pay rent at the rate of Rs. 2 might be enhanced to either Rs. 3 or Rs. 5 as the circumstances will warrant, because both Rs. 3 and Rs. 5 will be the prevailing rates in respect of the twenty who form the minority. The rate claimed by the plaintiff must be such as is paid by the same class of raiyats for adjacent lands with similar advantages, and is the *prevailing rate*,—that is to say, the rate paid by so large a majority of the same class of tenants for such lands as would justify one to hold the rate claimed to be the prevailing rate." A Court canont give a decree for enhanced rent at a certain rate without any evidence as to that being the *prevailing rate generally* paid and not only by five or six witnesses of the same class of raiyats as the defendant for lands adjacent with similar advantages. —(Dhunraj Koonwar *v.* Ooggur Narain Koonwar, 15 W. R., 2.) Clause (*a*) of s. 31 makes another addition *e.g.*, the prevailing rate shall not only be *rates generally paid*, but such rates must be paid at least for three years before the institution of the suit. The evidence of three putwaries who put in their *jummabundis*, showing the rates paid by almost all the raiyats, *i.e*, the majority, was held sufficient to prove the "prevailing rate."—(Pryaglal *v.* Brockman, 13 W.R, 346). The Judge ought not to take into consideration the report of an Ameen in determining the prevailing rate in the neighbourhood, but should examine the witness himself—(Tweedie *v.* Purno Chunder, 12 W. R., 138.) In fixing the prevailing rate of rent, it is an error to strike an average between the statements of witnesses on opposite sides; the proper plan is to ascertain on which evidence reliance can be placed.—(Rowshan Bibi *v.* Chunder Madhub, 16 W. R., 177.) The words "prevailing rate" in s. 30, cl. (*a*) of the Bengal Tenancy Act, mean, not the average rate of rent, but the rate actually paid and current in the village for land of a similar description with similar advantages; they should be construed, therefore, in the same sense as was given to the same words in the earlier cases decided under Act X of 1859—(Shital Mondal *v.* Prossonnamoyi Debya, I. L. R., 21 Cal., 986.) The adoption of an average rate from different rates given by several witnesses

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is not a correct mode of fixing the proper rate.—Sumira Khatoon *v.* Gopallal, 1 W.R., 58; Audh Bihari Sing *v.* Dost Mahomed, 22 W.R., 185.) Where the ground relied on was the prevailing rate paid by the adjacent occupiers of similar land, and such ground could not be established by the probability or even certainty, that if the rents of the neighbouring occupants were readjusted, they would come to the rate claimed, such ground is not sufficient to make out that the rate claimed is actually being paid by the neighbouring raiyats.—(Brindabun *v.* Bisoner Bibi, 13 W. R., 107.) Where different raiyats holding similar lands with similar advantages in places adjacent pay at different but higher rates than the defendant for lands of the same description and quality, and if a generally prevailing rate cannot be found, the currency of the different rates being so nearly equal as to make it impossible to say which is the prevailing rate, the Court is not in error in taking an average.—(Sheik Dina Gazi *v.* Mohini Mohan, 21 W. R., 157.) In a suit for enhancement of rent on the ground that the defendant pays at a lower rate than that paid by the neighbouring raiyats of the same class for similar lands, if it be found that the prevailing rate is higher than the rent paid by the defendant, though lower than the rate claimed in the plaint to be the prevailing rate, the Court ought to give a decree at the actual rates found to be paid by the neighbouring raiyats.—(Akul Gazee *v.* Ameenuddin, 5 C. L. *R.*, 41.) In determining the enhanced rent under this section a Court cannot include *patwarins*, and other abwabs paid by raiyats in the neighbourhood.—(Burma Chowdry *v.* Sreenundo, 12 W. R., 29.) A claim to the *nirik* rate may be considered to be a claim at the pergunnah rate, that is, the rate paid by the same class of raiyats for similar lands in the neighbourhood.—(Amritalal Bose *v.* Arbach Kazee, 4 W. R., Act X, 47.) But a plaintiff who alleges as his ground of enhancement that the rates at which the defendant holds are lower than the prevailing rates in the neighbourhood, cannot ask for enhancement on the ground that the pergunnah rates are obsolete; or in other words, that the rates of the whole neighbourhood are too low. (Sreeram *v.* Lakhan Majilla, Marsh., 379; 1 Board's Rep., 116.) Pergunnah rates are not necessarily prevailing rates.—(Kalee Churan *v.* Ratan Gopal, 11 W. R., 571.) The words "surrounding rates" are not tantamount to the ground of enhancement in cl. 1 s. 17, Act X.—(Bogoo Nath *v.* Ramjai, 9 W. R., 292.) In a suit for enhancement on the ground that the defendant pays a lower rent than that paid by the neighbouring raiyats of the same class for similar lands, the Judge, instead of decreeing what he considers a 'fair rate,' should find specifically whether the rate claimed by the plaintiff is actually paid by the neighbouring raiyats of the same class for similar lands or what rate is so paid, and decide accordingly.—(Pelaram *v.* Nundo Kumar, 6 W. R., Act X, 45.) But where it is found that there is no one prevailing rate and that the raiyats holding land in the village of similar description and with similar advantage, pay rent at varying rates, the lowest rate may be taken and the rent of tenant may be enhanced up to that limit:—Alep Khan *v.* Raghunath, 1 C. W. N., 310. When there were different kinds of land, and the majority of tenants holding lands similar to those of the defendant paid a higher rate, this higher rate was held to be the prevailing rate (Maugni Ram *v.* Seo Charan Munder, 1 C.W.N., clxxix). It is not enough for a Court

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to find generally that the plaintiff is entitled to an enhanced rate; there must be a distinct finding as to the ground on which he is so entitled.—(Gunga Narain *v.* Sharoda Mohan, 12 W. R., 30). A decree should not give a plaintiff more than he claims, *e.g.*, where homestead land was assessed in the plaint at Re. 1-8, the Court cannot decree at Rs. 2 per bigha.—(Ghyrulla Mundle *v.* Kishore Nath, 5 W. R., Act X, 60.) This section does not say that in every case the rate of rent may be raised to the prevailing rate, but only that the rent should not be raised except on some one of the grounds specified. It must always be read with reference to the general provisions of s. 5 (see ss. 27 and 35 of the new Act), that the rent of a raiyat having a right of occupancy shall not be more than what is fair and equitable; and in considering what is fair and equitable, the raiyat should not be called upon to pay to the landlords what is in fact not rent, but the produce of his own labour and capital sunk in the land.—(Noor Mahomed *v.* Harri Prosunno, Sp. W. R., Act X, 75.) A plaintiff who sues for enhanced rent is bound to prove that the present rate is not fair and equitable.—(Hills *v.* Jender Mundle, 1 W. R., 3). In a suit for enhancement of rent under s. 30 the case was referred to arbitration on the application of the parties and the arbitrator settled a fair and equitable rate: *held* that the arbitrator had jurisdiction to do so inasmuch as the parties declared that they would be bound by what the arbitrator would decide:—Gangacharan Roy *v.* Sasti Mandal, 6 C. W. N., 614.

The words "fair and equitable" in s. 5 mean, not the rate obtainable by open competition, but the prevailing rate payable by the same class of raiyats for land of a similar description and with similar advantages in the places adjacent, where the customary rate had adjusted itself with reference to the produce.—*The Great Rent Case*, 3 W. R., Act X, 29)

"In other respects this ground of enhancement has not presented any difficulties, and the cases do not show that, so far as it is concerned, any amendment of the law is very urgently required. The idea of a pergunnah rate of rent, a prevailing rate by the tenants of the same class within a certain tract of the country, has long been familiar to the people, and where such a rate is generally known and acknowledged, a landlord has seldom, in the absence of other disturbing circumstances to put a raiyat into Court in order to get him to pay rent according to this rate. The germ of dispute and litigation does not lie here. The landlord who seeks to put an individual raiyat on an equality with his brethren has public opinion generally in his favour, for human nature in Bengal, as elsewhere, is envious of an individual better off than the rest of the community, and takes pleasure in the assertion of the principle of equality when violated by the superior condition of a neighbour. It is when the landlord seeks to raise the rate for all raiyats, when all are threatened with a common misfortune that unanimity for self-defence, and combination against the general enemy, rule the village councils, and leave the zemindar no hope of success without some such coercion as the law permits."—R. C. R.

"We were unable to accept the proposal to abolish the prevailing rate as a ground of enhancement, inasmuch as this has, in one shape or another, been a ground of

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enhancement ever since the Permanent Settlement, and as it is the only means by which a landlord can remedy the effects of fraud or favoritism on the part of his agent or predecessor."—*(R. S. C. B. T. B. No. III, Gazette of India, February 21st, 1885.)*

On the subject of the amendments made in this section and in sec. 31 of this Act by the amending Act of 1898, the Statement of Objects and Reasons says:—"The third object of this Bill is to amend the substantive provisions of the law relating to the enhancement of rent, so as to make them workable on certain points on which they are now practically inoperative. In suits and proceedings for enhancement of rent on the ground of prevailing rate, the Civil Courts and Revenue Officers are bound to confine their enquiries and comparisons of rates to the same village, and the definition of what is a pervailing rate is so vaguely worded that in practice it is found almost impossible to enhance rents on this ground. A revenue survey village in Bengal may contain 100 acres, or several thousand acres, or may consist of scattered blocks. It does not necessarily furnish proper standard of comparison. As regards the meaning of the term "prevailing rate," there is only one decision of the High Court bearing on the subject, and that declares that a prevailing rate is *not* an average rate, but does not explain what it is. The view taken by the Special Judges has been that a prevailing rate is a uniform rate paid by a majority of the raiyats for lands of the same class in the village. This was the interpretation generally put on the term "prevailing rate" under Act X of 1859. The effect of the wording of section 30 of the Act, as it stands, is to give a ground of enhancement which cannot be worked. It is proposed to somewhat enlarge the area for comparison, while an attempt is made to define what is meant by "prevailing rate." Whatever objections there may be to this ground of enhancement generally, it is universally admitted that when land is held at a pepper-corn rent by reason of fraud or collusion between the proprietor's *amla* and the raiyats, there is no other ground on which the *zemindar* can obtain an enhancement up to a reasonable rate except that of the "prevailing rate, and in such cases it is just that this ground of enhancement should be made a workable one. The intention of the amendments proposed in sections 30 and 31 of the Act, and of the new sections 31 A and 31 B is to effect this object, without at the same time endangering the interests of the tenants by making an average rate a prevailing rate, thus rendering it possible to level all the lower rates up to such average rate, while maintaining all the higher rates, however much in excess they may be of the average rate. As, under the definition now proposed, a prevailing rate will always be found where rates exist at all, and the effect of the new definition will be to greatly facilitate the enhancement of rents, and as rents are known to be already too high in certain districts, power is taken by Government to withhold the operation of the new definition from any district or part of a district. In order to guard against all the rates being levelled up to the maximum rate, by manipulation of new prevailing rates from time to time, it is provided in section 31 B that a prevailing rate once determined shall not be liable to enhancement except on the ground of rise in prices."

The case referred to in the above extract is apparently the case of Shital Mandal v. Prasanna Mayi Debi I. L. R. 21 Cal., 986, cited above, in which it is said that

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the words "prevailing rate" in clause (a) section 30 appear to be used in the sense in which they are used in the earlier cases under Act X of 1859, and mean "the rate actually paid and current in the village, and not the average rate." These principles are important and still hold good in districts to which Government has not extended the provisions of s. 31 A *post*.

Paid by occupancy-raiyats for same class of lands.

It is not of course sufficient for the Court to find what is the prevailing rate; it must also ascertain what is the prevailing rate paid by occupancy-raiyats, or in the words of the old Act by raiyats of the same class as the defendant. The mere fact of a particular rate of rent having been decreed against two raiyats not having a right of occupancy is not enough to show that the rate so decreed was the rate prevailing in the neighbourhood.—(Surahutoonisa *v.* Gyanee Buktur, 11 W. R., 142.) It is essential that the prevailing rate shall be paid by occupancy-raiyats and by raiyats with similar advantages.—(1 R. J. P. J., 48 (Sev. 23), Sev. 136; Purmanund *v.* Puddomoni, 9 W. R., 349; Woomanath *v.* Ashumbar, 12 W. R., 475; Mothuranath *v.* Nilmoni, 13 W. R., 297.) The perplexing phrase "raiyats of the same class" of the old law has been done away with, though it referred obviously to occupancy-raiyats. Raiyats having customary rights have, however, some advantages under cl. (*c*) of s. 31. Where, however, custom is not pleaded, there cannot be separate grades of raiyats within the general body of occupancy-raiyats. In one case under the old law, the Calcutta High Court considered that, if there was only a slight difference between the lands held by the defendants and the lands with reference to which their liability was adjudged, the rate of rent awarded on the latter basis might be considered as in conformity with "the spirit of the Rent Law." The correctness of this decision is open to question.—Tekaram *v.* Sandes, 22 W. R. 335.

And there is no sufficient reason for his holding at a low rate.—This is an addition to the old law. One sufficient reason may be the caste consideration of the raiyat (see section 31 (*c*)). The jungleboori raiyats seem to have been specially in view of the Legislature. In Chowdry Khan *v.* Gour Jana, 2 W. R., (Act X) 40, Mr. Justice Campbell observed:—"When a raiyat simply brings jungle land into cultivation, then, after a reasonable period, he is liable to pay the full pergunnah rates of cultivated land. But if he has to do more than bring into cultivation uncultivated land; if the land which he originally received was not only uncultivated jungle, but was in its then state impracticable for cultivation—if it was salt land, which could only be made sweet by special works of the raiyat, or rock, which could only be made culturable by special labour—then I think that the raiyat who made those works, or expended that special labour, would be entitled to hold at exceptionally low rates. So, again, if, having received ordinary land, he converted it into land of specially high value, then I think he would not be liable to pay exceptionally high rates, but only the ordinary rates paid by land of the same quality, irrespective of the special character impressed on it by himself."—(See Noor Mahmed *v.* Hari Prosuno, Sp. W. R., (Act X) 75; Paramand *v.* Padmani, 9 W. R., 349). So in Huro Prosad *v.* Chundee Churan, (I. L. R., 9 Cal., 505; 12 C. L. R., 251), the Court held that where land was let for the purpose

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of clearing jungle or other reclamation, and on this ground a reduced rent is provided from the first few years, after which the full rent was payable, such rent was not liable to enhancement.—See also Soora Sundari *v.* Gholam Ali, 19 W. R., 141 (P. C.)

Ground (b): Rise in prices of staple food crops:—The increase in the value of the produce must be an increase "in its natural and usual value" in ordinary years; the accidental and exceptional high prices of a particular year in consequence of drought and scarcity, cannot be treated as a measure by which rent is to be adjusted. A tenant takes land, not with reference to the exceptional high prices of a past year, but with reference to the prices he may reasonably excpect to realise for the crops he will raise in succeeding years."—(Bhagruth *v.* Mashoop, 6 W. R., Act X, 34.) The increase in the value of the produce must be a permanent one, - that is, a steady and normal increase, and not one that fluctuates in a violent and uncertain way, and is affected by extraordinary causes not likely to last.—(Thakorani Dasi *v.* Bissesur, 3 W. R., Act X, 142.) As to the kind of evidence which was considered relevant to prove the increased value of produce, see Huro Prosad Rai *v.* Umatara Debi, I. L. R., 7 Cal., 263; 8 C. L. R. 449.

The increase must be natural

"The fourh ground of enhancement is that the value of the produce has increased. It appears to us that this ground of enhancement is altogether distinct from an increase in the quantity of the produce due to an improvement in the productive powers of the soil. We have in consequence entirely separated these two grounds. In stating this fourth ground we have in the first place substituted the term "price," which is equivalent to money value for "value" which includes other value besides money value. We have thus made the language more precise without altering what we understand to have been the intention of those who framed Act X of 1859. The price of agricultural produce has increased enormously in these provinces during the last twenty or thirty years. This increase is due to two principal causes. In the first place, even while the relative value of the precious metals which are used for the coinage of a country remains the same, there is a constant tendency* for the money value or price of agricultural produce to rise as population increases and improvement progresses. The province of Bengal has been rapidly progressive in every way during the last century of peace and security. Population has increased. A large and still expanding export trade has brought, the demand of other countries to bear upon prices in addition to the enlarged demand of the province itself. In the second place the coinage consists of silver, and the relative value of silver has been gradually decreasing. The price or money value of the produce has therefore risen. We are of opinion that the landlord should have a share in the increase of price due

The Rent Commission.

* Political economists lay down the proposition that, while the rate of profit and interest has a downward tendency in a progressive community, rent (*i. e.*, in their sense of the term rent) on the contrary tends to rise incessantly—that in fact all progressive wealth and population tends to a rise of rent—See Mill's Political Economy, Vol. I. p. 386; *Systems of Land Tenure in various countries*, p. 221, where capitalist farming prevails; any fall in the usual rate of profit and interest must operate directly to increase rent; but apart from this cause rent increases in a progressive community. An advancing population has a tendency to create a a larger demand for food and the price rises in consequence.

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to the above two causes. It is not possible to separate the respective effects of these causes and so calculate how much of the increase is due to each. The landlord ought, however, according to our view, to participate in the benefit arising from each. The first cause, *i. e.*, the general progress of the community, makes the land more valuable as a natural agent for the production of food. The increase of value, if not taken by the State—and the effect of the Permanent Settlement is that the State does not take it —must go to those whom the law allows to keep all that interest in land which constitutes property in land. Now the persons, who in these provinces have this property in the land under the existing law, are the zemindars and the raiyats, not the raiyats only. Therefore the zemindars, having a share in that complete interest which constitutes property, ought to have also a share in that increase of value which is an accession to that interest. The effect of the second cause is to diminish the value of the rent payable in silver in relation to all commodities, which the landlord can obtain for the money which he receives as his rent. This money, therefore, represents a smaller share of the produce than it did before the relative value of silver fell. It is but equitable, therefore, that the money rent of the landlord should be increased so as to make it represent a share of the produce equal to what it represented when the rent was originally fixed. Then there are other considerations. The benefit accruing from the operation of the first cause is limited by the quantity of the produce which the raiyat sells or barters away. In respect of the portion retained for consumption by himself, his family and his cattle, and for seed, there is no direct benefit from the rise in price, because this portion does not come into the market. Here the first cause differs from the second, and it differs also from the third ground of enhancement, under which the excess quantity of produce obtained from the increased productive power of the soil represent so much clear benefit. From this analysis it will appear that the component elements of this ground of enhancement are sufficiently complex; and looking at the above considerations, it is not very easy to say how the increment arising from increase of price ought to be divided so as to make the division fair to both parties.

"Here, as in the case of the third ground, it is possible to conceive that the increase of price may be brought about (1) by the agency or at the expense of the raiyat, or (2) by the agency or at the expense of the landlord, or (3) without the agency or expense of either. In the first case, as the law now stands the rent of the raiyat is not liable to enhancement. He receives the full benefit of the increase in price which he has himself brought about. That is the effect here also of the words 'otherwise than by the agency or at the expense of the raiyat' and we do not propose to alter this. At the same time it is not easy to suppose a case in which the raiyat could effect an increase in the price of the produce solely by his own agency or at his own expense. In so far as better prices may be due to improved means of communication, which have been effected by the road cess or public works cess funds, we have provided that the raiyat shall pay so much less enhanced annual rent as is equal to the annual sum which he has contributed to these funds. In the second case, or where the increase of price is due entirely to the zemindar's agency, or has been brought about altogether at his

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expense, it appears to us, on the whole, to be reasonable that he alone should receive the entire benefit. A case of this sort might occur where a zemindar had opened a new *hat* and improved the means of communication between it and the land of his estate. In the third case, which is by far the most common, the case, that is, of an increase of price brought about by neither the zemindar nor the raiyat, but by general causes, the reasoning used above (section 55) in respect of the similar case arising upon the third ground of enhancement appears to have equal application. Having given the whole subject in its diversified details what consideration we have been able, a majority of us think that the fairest general rule here also will be to divide the increment equally between the landlord and tenant. Messrs. Mackenzie and O'Kinealy would in this case, as well as in the analogous case under the third ground of enhancement give two-thirds of the increment to the raiyat and the remaining one-third to the landlord.

"As to the period of past time between which and the present the comparison should be instituted, and as to the causes of the increase being not merely temporary or casual, the remarks above made upon the third ground of enhancement apply. Then as to the markets, the prices of which should govern, we have provided that the prices in the locality or at the usual markets are to be taken. There ought to be sufficient evidence of these prices procurable from the local *mahajans* and their books or from other sources. We have further facilitated the proof by providing for the preparation and publication of annual official price lists, the object and use of which we shall explain hereafter.

"The next question which has engaged our attention with this part of the subject is the very important one of the species of produce which shall be taken for the calculation of prices. Shall these prices be calculated for all the crops actually grown on the lands, as well for special crops requiring special care and cultivation, as for the ordinary food-crops of the district? During the period antecedent to British rule it was usual to vary the rent with the crops cultivated. Section 56 of Regulation VIII of 1793 enacted that "where it is the established custom to vary the pottahs for lands according to the articles produced thereon, and while the actual proprietors of land, dependent talukdars or farmers of land and raiyats in such places shall prefer an adherence to this custom, the engagements entered into between them are to specify the quantity of land, species of produce, rate of rent, and amount thereof, with the term of the lease and a stipulation that in the event of the species of produce being changed a new engagement shall be executed for the remaining term of the first lease, or for a longer period if agreed on; and in the event of any new species being cultivated a new engagement with the like specification and clause is to be executed accordingly." It can well be understood that a despotic Government or its more despotic subordinates observed carefully any circumstances that would enable the cultivators to pay more than had previously been obtained from them. Where the share of the State was taken in kind, a less proportion was always accepted for special crops in consideration of the greater care and expense necessary to their production. Where the share of the State had been commuted to a money-payment, very high rates

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were imposed on the lands on which special crops were grown. These rates were too often regulated more with reference to the aggregate value of the gross produce, which was very considerable, than upon a due allowance for the cost of production, which was very much larger item in proportion than in the case of ordinary crops. In reasonably good years the raiyat was able to pay and make a good profit; then came a year of failure, it may be when he had made a larger venture than usual, and the little capital vanished, while the high rates had to be paid, and perhaps the *mahajan's* assistance had to be called in for this. The memory of the year of failure survived, kept green by the mahajans long surviving claim, while the years of success from which little or nothing was saved were soon forgotten. It thus happened that the exaction of very high rates for fields devoted to special cultivation discouraged and retarded agricultural improvement. It may be well to draw here a distinction between higher rates for superior land capable of producing superior crops and therefore suited for these special crops—such rates being paid without direct reference to the particular crops actually produced from year to year—and higher rates assessed with direct reference to the crops annually grown. The latter are sure to run much higher than the former, and in a bad year the loss and the cause of it are felt more distinctly. This distinction and the bad effects of levying a high rate directly on the crop were understood many years ago. As early as 1792 the Government wrote as follows in the Revenue Despatch of the 12th December of that year: 'Apprehending that the present great demand for sugar and the consequent rise in the price of it might induce some of the landholders to exact from their raiyats an enhacement for the ground appropriated to the cultivation of the cane; and, as such short-sighted policy would have discouraged the extension of the cultivation of it, and consequently prevented the establishment of a trade in sugar between this country and Europe, we thought it advisable to issue a notification to the landholders prohibiting any enhancement of the rent of the sugarcane lands upon the ground of its being repugnant to the usage of the country as well as detrimental to their own interest and that of the State at large.' We find the Directors writing out in 1837 to the following effect: 'It is the productive power of the land, and not its actual produce, that should be taken as the guide in making the assessment. By this mode the best description of encouragement is given to the cultivator to extend cultivation and raise crops immediately beneficial and profitable to himself, and such a system, we have on a former occasion observed, and are still of opinion, would not ultimately be found detrimental to the interest of the State.' We do not therefore propose to interfere with any existing classification of lands based on their superior quality, or capability of producing special crops, but we think that, in regulating enhancement of rent on the ground of rise of prices, account should be taken of the ordinary staple crops only. A different rule would, in our opinion, tend to discourage the cultivation of new and valuable species of production, and so prevent agricultural improvement. By allowing the Board of Revenue to declare from time to time what shall be taken to be staple crops for particular areas, an opportuninty will be afforded of making any new crop a staple as soon as its cultivation has been thoroughly and generally established. As to special crops, such as betel leaf, tobacco,

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sugarcane, and such like, we think that as they are grown only occasionally or in small quantities, and require particular attention and involve special expenditure, they ought not to be considered in settling enhanced rents. We may further observe in support of this view that, in commuting the tithe into a money payment in England, staple crops only were taken into account, the staples selected being wheat, oats, and barley. (R. C. R. Vol. II), pp. 30 to 33).

"The only other amendments in the chapter which appear to call for special notice are as follows:

(*a*) We have required Courts, in dealing with claims to enhancement on the ground of a rise in prices to take decennial periods instead of quinquennial periods for the purposes of comparison, except when, owing to the absence of price lists or any other cause, they find it impracticable to take such periods, in which case they may take any shorter periods;

(*b*) We have amended section 39 so that the price lists prepared under it shall be merely presumptive evidence instead of being conclusive, as provided in the corresponding provisions of Bill No. II. The Bengal Government are of opinion that their arrangements are not at present so perfect as to justify these lists being made conclusive evidence—(*S. B. T. B. No. III, Gazette of India, February 21st*, 1885).

Grounds (c) and (d): Increase of productive powers:—Grounds (c) and (d) are subject to sections 33 and 34 of the Act. The increase does not mean the capacity for realising a higher rent for building or other purposes; but an increase of the productive powers of the land itself—(Bissesur *v.* Woomachurn, 9 W. R., 122; Kenyah Chyeman *v.* Jan Ali, 1 W. R., 46.) Where a considerable portion of a town had been carried away by the Ganges, and the value of the land has consequently increased, it was held that a rise in the value of the land from such a cause was not an increase in the productive powers of the land as contemplated by this section—(Khondkar Abdur Rahaman *v.* Wooma Churan, 8 W. R., 330.) The increase of the value of land by reason of the existence of a distillery or of a rope-yard is not an increase in the productive powers of the land within the meaning of this section—(Brojonath *v.* Stewart 16 W. R., 216; Madun Mohun *v.* Stalkart, 17 W. R., 441). A casual increase in the fertility of the land is not a ground for a permanent enhancement of rent—(Kisto Mohun *v.* Huri Sunkur, 7 W. R., 235). The increase must either be permanent or likely to last for a considerable time—(Khajeh Abdool *v.* Bhuttoo Sheik, 22 W. R., 350). An enhancement of rent can be had under this clause where the increase has resulted from additional productiveness in the soil arising out of fertilising deposits, or from increased facilities for disposing of the produce, arising out of the construction or protecting of embankments, or the introduction of railways, or the rise of new markets, or the generally increased facilities of communication which are caused by the construction of ordinary metalled roads, &c.—(Poolin Bihari *v.* Watson & Co., 9 W. R., 190, F. B., *per* Seton Karr, J).

The old section had "*otherwise than by the agency, or at the expense of the raiyat.*"

Improvement by landlord.

For "improvements" see sections 76 to 84. It is not sufficient to show that the productive power of the land has increased;

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the landlord must also show that the increase has been brought about "by improvements made by himself or by fluvial action." Where a raiyat has dug a tank for public use, and the garden he rented had been rendered productive by the exertions and outaly of the tenants, the land was held not liable to enhancement—(Sreeram *v.* Lakhan Majilla, Marsh. 379; 2 Hay, 427). On the other hand where tenants had held land for some 25 years at rents much below the prevailing rates, it was held they were not entitled at the end of that time to plead the expenditure of their own capital and labour as against the landlord's claim to enhanced rent—(Prosunno Kumar *v.* Radha Nath. 7 W. R., 97). The fact is that when enhancement is sought under ground (*a*), the questions of improvements and costs of cultivation &c., do not intervene except so far as may be brought to bear upon the ground under section 35. Where the crops had been deficient in quantity, and owing to the care and labour of the raiyat, they had increased in value considerably above that of former years, the raiyat was entitled to set off such against a suit for enhancement—(Shoudamini *v.* Haran Chunder, 6 W. R. (Act X), 103). Where a raiyat had taken lease of some land covered with jungle at a low rent, and had afterwards cleared the jungle and made the land in an orchard, it was held that the landlord could not enhance the rent to the rate paid for other orchards in the neighbourhood, inasmuch as the improvements had been effected by the exertion and at the cost of the tenant.

Conversion of an arable land into an orchard.

It is not of course meant that a raiyat who takes jungle land is to hold it for ever at jungle rates. When he simply brings jungle land into cultivation, he is liable, after a reasonable time, to pay the full pergunnah rates for cultivated land; but if the land which he originally received was not only uncultivated jungle, but in its then state impracticable for cultivation; if, for instance, it was salt land, which could only be made sweet by special works of the raiyat, or rock, which could only be made culturable by special labour, than the raiyat who made these works, or expended that labour, would be entitled to hold at exceptionally low rates. So again, if having received ordinary land and converted it into land of specially high value, he would only be liable to pay the ordinary rates paid for land of the same quality, irrespective of the special characters impressed upon it by himself (Chowdry Khan *v.* Gour Jana, 2 W. R. Act X, 40; Golamal *v.* Babu Gopal Lal, 9 W. R., 65). So where a tenant erects distillery, the land is not liable to enhancement —(Braja Nath *v.* Stewart, 8 B. L. R., App. 51 ; 16 W. R., 216). Under the old law where the productive powers had increased by reason of the Government having erected an embankment, land so liable to enhancement—(Jadub Chandra *v.* Etware Luskur, Marsh., 498.) It would not be so now under the present law, because the improvement by the Government is not an improvement made by the landlord or by fluvial action. When a defendant allows that the productive powers of the land have increased, it is still incumbent on the plaintiff to show that the agency which effected the increase was not that of the raiyat, or under the present law was that of himself or fluvial action "When," observed the Chief Justice, "a defendant comes into Court, and the Court asks him 'what do you say to the plaintiff's claim?' and he says 'I admit that the productive-

Burden of proof.

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ness has increased but not otherwise than by my agency,' such an admission must be taken altogether. So it is in the case of a written statement. A written statement put in by a defendant is not a plea by way of confusion and avoidance; it is the statement of the grounds of his defence, and he must verify the statement. If you read a man's answer you must take the whole admission together. Taking the whole admission together in this case, the defendant says 'that the productiveness has increased, but not otherwise than by my agency,' and the plaintiff has to prove his case. The general rule of evidence is that if in order to make out a title, it is necessary to prove a negative, the party who traverse the title must prove the title. The plaintiff alleged the right to enhance on the ground that the productiveness had increased otherwise than by the agency of the raiyat. I am of opinion therefore that the *onus* lay on the plaintiff to prove the ground of his right to enhance, namely that the productiveness of the land had increased otherwise than by the agency of the raiyat,"—(Poolin Behari *v.* Watson, 9 W. R., 190.) The change of words is significant in the new section, and the *onus* of proof now decidedly is upon the landlord.

In a suit for enhancement of rent, the defendant pleaded that the land was used solely for fruit trees, and that those trees were originally planted by the defendant; that consequently, any increase in the value and productiveness of the land in consequence of the growth of trees must be attributable to the agency of the defendant and therefore by section 18 of Act VIII of 1869 (B. C.), such increase would be no ground for enhancement: Held that this was bad defence—(Obhoy Chunder *v.* Radha Bullabh Sen, 1 C. L. R., 549). The Court (Garth, C. J., and Birch, J.) said: "It is in point of fact untrue that the increased productiveness of an orchard by reason of the growth of the fruit trees is due to the agency of the person who first planted them. After the first expense of preparing the land, and planting and nurturing the young trees has been incurred, the increase in the productiveness of an orchard depends probably far less upon the labour and outlay of the tenant than land used for the ordinary purposes of agriculture. The trees may require a certain amount of care and attention from time to time, but their growth and productiveness depend far more upon the quality of the soil and the fertilizing influence of the seasons, than upon the labour of man. It is quite right of course that in settling the rent of land which is let for the purposes of an orchard, a due allowance should be made to the tenant to cover the cost of his original outlay in the way both of labour and capital; but after such allowance has been made, there is no reason why the rent of the lands used for orchards should not be liable to enhancement or abatement from time to time, in the same way as lands used for other kinds of culture."

In a suit for enhancement of rent, bare proof that the productive powers of land in suit have been increased by the agency, or at the expense of the defendant or his ancestor, is not sufficient to exempt the defendant altogether from enhancement. In such a case, where the value of similar lands in the same locality, but not sharing the special advantages resulting from works or improvements erected or effected by, or at the expense of the defendant or his ancestor, has been increased by natural causes, it

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must be assumed that the lands of defendant, owe their increased value to that extent to natural causes, and are to that extent liable to enhancement—(Tekait Churamba v. Dunraj Roy, I. L. R., 5 Cal., 56.)

Court-fees.

Under clause xi of section 7 of Act VII of 1870 (the Court fees Act), in a suit to enhance the rent of a raiyat having a right of occupancy, the amount of the fee payable is computed according to the amount of the rent of the land to which the suit refers, payable for the year next before the date of presenting the plaint.

Rules as to enhancement on ground of prevailing rate.

31. Where an enhancement is claimed on the ground that the rate of rent paid is below the prevailing rate—

(*a*) in determining what is the prevailing rate the Court shall have regard to the rates generally paid during a period of not less than three years before the institution of the suit, and shall not decree an enhancement unless there is a substantial difference between the rate paid by the raiyat and the prevailing rate found by the Court;

(*b*) if in the opinion of the Court the prevailing rate of rent cannot be satisfactorily ascertained without a local inquiry, the Court may direct that a local inquiry be held under Chapter XXV of the Code of Civil Procedure by such Revenue-officer as the Local Government may authorise in that behalf by rules made under section 392 of the said Code;

XIV of 1882.

(*c*) in determining under this section the rate of rent payable by a raiyat, his caste shall not be taken into consideration, unless it is proved that by local custom caste is taken into account in determining the rate; and, whenever it is found that by local custom any description of raiyats hold land at favourable rates of rent, the rate shall be determined in accordance with that custom;

(*d*) in ascertaining the prevailing rate of rent, the amount of any enhancement authorized on account of a landlord's improvement shall not be taken into consideration;

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(*e*) if a favourable rate has been determined under clause (*c*) for any description of raiyats, such rate may, if the Court thinks fit, be left out of consideration in ascertaining the prevailing rate (Act III B.C. of 1898);

(*f*) if the holding is held at a lump rental, the determination of the rent to be paid may be made by ascertaining the different classes of land comprised within the holding, and applying to the area of each class the prevailing rate paid on that class within the village or neighbouring villages (Act III B. C. 1898.)

Extended to Orissa (Not., January 27th, 1892 and Nov. 5th, 1898).

Under section 392 of the Code the Local Government has issued the following notification regarding the class of officers from among whom a Commissioner may be appointed : —

In modification of the Government Notification dated the 4th November, 1885, the Lieutenant-Governor has been pleased to make, under section 392 of Act XIV of 1882, the following revised rules as to the persons to whom commissions shall be issued under the Bengal Tenancy Act :—

Whenever, under sections 31 (*b*) and 158 (2) of the Bengal Tenancy Act, a Court directs that a local inquiry be held under Chapter XXV of the Code of Civil Procedure, the commission shall be issued to such person, not being below the rank of a Sub-Deputy Collector, as the Collector of the district may, from time to time, select for the purpose. The Court shall issue a precept to the Collector, requiring him forthwith to nominate a fit person as above to conduct the inquiry, and the commission shall be issued to the person so nominated.

The Board of Revenue has issued the following instructions regarding local inquiries :—

In supersession of the Board's Circular Order No. 3 of July 1891, the following suggestions are circulated with the object of enjoining the necessity of not exceeding the charges allowed by the Court in issuing commissions, under sections 31 (*b*) and 158 (2) of the Bengal Tenancy Act, for holding local inquiries :—

1. The person to whom the commission is issued is not, under the rule made by the Local Government by notification dated the 22nd July 1890 and published at page 756 of Part I of the *Calcutta Gazette* of the 23rd idem, below the rank of a Sub-Deputy Collector, and he is bound, under the Civil Procedure Code, to make the local inquiries himself. The officer so deputed can entertain a reasonable staff of chainmen and *amins* to enable him to perform the work properly.

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2. No cost should be incurred to meet the charges of local inquiry beyond that actually allowed by the Court issuing the commission, under Rule 30 (*b*) at page 41 of the High Court'sGeneral Rules and Circular Orders, as revised in 1891. If the probable costs were calculated with regard to the time likely to be occupied in the execution of the commission, and the Commissioner finds that the time fixed is insufficient, he should give timely notice to the party at whose instance the commission was issued, and report the fact to the Court. Then, unless the sum necessary to cover the expenses for such further period as may be required to complete the execution of the commission is deposited in Court by the party, and the Commissioner certified of such deposit, he should suspend the investigation at the close of the period originally fixed, pending the further instructions of the Court.

Rule 30 (*b*) (4) page 41 of the High Court's Circulars.

The expenses of the commission will generally fall under the following heads:—

(1) Remuneration of the Commissioner.

(2) His travelling and halting allowances.

(3) Charges for the temporary subordinate establishment that may be employed.

(4) Incidental charges that may be unavoidable.

The first will be calculated on the basis of the actual pay which the person to whom the commission is issued has been receiving. The second will be regulated by the scale prescribed for officers of Government of the class to which the Commissioner belongs, unless the Court should, for exceptional reasons, order an allowance in excess of the above. The third and the fourth will be passed on the authority of the Revenue-officers concerned, but must on no account assume proportions so as to exceed, in conjunction with the charges under heads (1) and (2), the sum actually allowed by the Court."—(Board's Rev. Cir, No. 4 of August 1894).

Rule 30 (*b*) (5), page 41 of the High Court's Circulars.

What may be taken in certain districts to be the "prevailing rate."

'31A. (1) In any district or part of a district to which this sub-section is extended by the Local Government by notification in the *Calcutta Gazette*, whenever the prevailing rate for any class of land is to be ascertained under section 30, clause (*a*), by an examination of the rates at which lands of a similar description and with similar advantages are held within any village or villages, the highest of such rates at which and at rates higher than which the larger portion of those lands is held may be taken to be the prevailing rate.

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1. Inserted by the Act III of 1898, s. 4.

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Illustrations.

(*a*) The rates at which land of a similar description and with similar advantages is held in a village are as follow :—

Bighas		RS.	A.	P.
100	at	1	0	0
200	,,	1	8	0
150	,,	1	12	0
100	,,	2	0	0
150	,,	2	4	0
Total ... 700				

Then Rs. 2-4 is not the prevailing rate, because only 150 *bighas*, or less than half, are held at that rate. Rs. 2 is not the prevailing rate because 250 *bighas*, or less than half, are held at that or a higher rate. Re. 1-12 is the prevailing rate, because 400 *bighas*, or more than half, are held either at this or a higher rate, and this is the highest rate at which, and at rates higher than which, more than half the land is held.

(*b*) The rates at which land of a similar description and with similar advantages is held in a village are as follow :—

Bighas		RS.	A.	P.
100	at	1	0	0
250	,,	1	4	0
150	,,	1	8	0
150	,,	1	12	0
50	,,	2	0	0
Total ... 700				

Then, for the reasons given in Illustration (*a*), neither Rs. 2 nor Re. 1-12 is the prevailing rate, nor is Re. 1-8 the prevailing rate, because only 350 *bighas* (exactly half) are held at Re. 1-8 or at rates higher than Re. 1-8. In this case Re. 1-4 is the prevailing rate, because more than half the lands are held at Re. 1-4 or higher rates, and this is the highest rate at which, and at rates higher than which, more than half the land is held.

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(2) The Local Government may, by a like notification, withdraw sub-section (1) from any district or part of a district to which it has been extended as aforesaid.

Extended to Orissa (Not., Novr. 5th, 1898) and to Tipperah (Not., No. 1470 T. R., Sepr. 1st, 1900).

This has not been extended to any other part of Bengal or Behar; so that, throughout the whole of the territories under the administration of the Lieutenant-Governor of Bengal, except Orissa and Tipperah districts, the definition of a prevailing rate, adopted by the High Court under the old law, still holds good (see notes to section 30, *ante*,)

Limit to enhancement of prevailing rate.

[1]**31B.** When the prevailing rate has once been determined by a Revenue-officer under Chapter X or by a Civil Court in any suit under this Act, it shall not be liable to enhancement, save on the ground and to the extent specified in section 30, clause (*b*), and section 32.

Extended to Orissa (Not., Novr. 5th, 1898).

Under this section, when the prevailing rate has once been determined in accordance with the provisions of this Act, it is not liable to enhancement again except on the ground of a rise in prices.

The object of this section is to guard against a perpetual levelling up of the rates by the repeated application of the rates relating to the prevailing rate.

Rules as to enhancement on ground of rise in prices.

32. Where an enhancement is claimed on the ground of a rise in prices—

(*a*) the Court shall compare the average prices during the decennial period immediately preceding the institution of the suit with the average prices during such other decennial period as it may appear equitable and practicable to take for comparison;

(*b*) the enhanced rent shall bear to the previous rent the same proportion as the average prices during the last decennial period bear to the average prices during the previous decennial period taken for purposes of comparison; provided that, in calculating this proportion, the average prices during the later period

1. Inserted by Act III B. C. of 1898.

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shall be reduced by one-third of their excess over the average prices during the earlier period;

(*c*) if in the opinion of the Court it is not practicable to take the decennial periods prescribed in clause (*a*), the Court may, in its discretion, substitute any shorter periods therefor.

Extended to Orissa (Not. June 27th, 1892).

Decennial period:—"We have required Courts, in dealing with claims to enhancement on the ground of a rise in prices, to take decennial periods instead of quinquennial periods for the purposes of comparison, except when, owing to the absence of price lists or any other cause, they find it impracticable to take such periods, in which case they may take any shorter periods." (S. C. R. B. III.)

"Formerly it was necessary for the landlord to prove to the Court when the rent was last fixed, in order to be able to enter into any comparison at all. The Court may, under this Act, take any period during the currency of the rent that may be equitable and practicable for comparison. As a rule, in order to eliminate the effect of special seasons, decennial periods will be taken, but the Courts may, if necessary, substitute shorter periods. In order to facilitate the comparison, the Local Government will have to draw up, from the materials which are available to a certain extent, for the last 20 years, statements of past prices, and in future to record prices accurately publish them for criticism, and finally after revision, publish statements of annual average prices."—See s. 39, *post*. (*The Hon'ble Steuart Bayley in Council.*)

As to the rule of proportion under the old Act and the mode of supplying it, see notes under s. 24, p. 138 *ante*. The rule of proportion prescribed by the Great Rent Case was: "The old rent must bear to the increased rent the same proportion as the former value of the produce of the soil, calculated on an average of three or five years next before the date of the alleged rise in value bears to the present value." This rule is certainly modified by the new rule of proportion given in this Act which will now be the measure of enhancement in ordinary cases; one-third of the difference between the two rents shall however be the *maximum* limit. The modifications are these: (1) The application of the rule is now limited to *money-rents* and enhancement on the ground of a *rise in prices*. (2) The periods between which a comparison is to be made are *decennial periods* instead of periods from three to five years. (3) In the Great Rent Case no account was taken of *increase of cost of production*; a deduction of one-third of the increase of price is allowed by the new rule in order to cover this. (4) The new rule applies to all *money-rents*; the old rule was limited to customary rents, *i.e.*, rents fixed according to the rate commonly payable by the same class of raiyats for similar lands in the places adjacent, and representing a share of the gross produce calculated in money—(B. L. R. F. B., 202; 6 W. R., Act X, 34; 7 W. R., 94, 144; 9 W. R., 348; 6 B. L. R., Ap., 122.)

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Reduced by one-third:—This deduction is allowed in consideration of the increased cost of cultivation.

"We are of opinion that the tendency in this country of the cost of cultivation to increase is in a higer rate than prices. So far as the labour is done by the cultivator's family or by labourers paid in grain (as is mostly the case in India), no benefit under this item can accrue to the cultivator from increase of prices. On the other hand, as population and prices have increased, pasturage has diminished; cattle are dearer to buy, dearer to keep, and less remunerative; manure is dearer, and so is fuel; and all these elements have to be taken into account. The Local Government proposed to deduct one-half for the increase of prices to cover the increased cost of cultivation; we recognized the impossibility of asking the Courts to solve the hopeless problem of increased cost in each case, and found it necessary to draw an arbitrary line. We have drawn it one-third." (S. C. B. III.)

Rules as to enhancement on ground of landlord's improvement.

33. (1) Where an enhancement is claimed on the ground of a landlord's improvement—

(*a*) the Court shall not grant an enhancement unless the improvement has been registered in accordance with this Act;

(*b*) in determining the amount of enhancement the Court shall have regard to—

(i) the increase in the productive powers of the land caused or likely to be caused by the improvement,

(ii) the cost of the improvement,

(iii) the cost of the cultivation required for utilising the improvement, and

(iv) the existing rent, and the ability of the land to bear a higher rent.

(2) A decree under this section shall, on the application of the tenant or his successor in interest, be subject to re-consideration in the event of the improvement not producing or ceasing to produce the estimated effect.

For "improvement registered," see s. 80 *post* and ss. 76 to 83, also Government Rules, Appendix.

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Rules as to enhancement on ground of increase in productive powers due to fluvial action.

34. Where an enhancement is claimed on the ground of an increase in productive powers due to fluvial action—

(*a*) the Court shall not take into account any increase which is merely temporary or casual;

(*b*) the Court may enhance the rent to such an amount as it may deem fair and equitable, but not so as to give the landlord more than one-half of the value of the net increase in the produce of the land.

Extended to Orissa (Not., June 27th, 1892).

Under the old law it was held that a casual increase in the fertility of the soil was not a ground for a permanent enhancement of rent—Krista Mohan *v.* Hary Sanker, 7 W.R., 235; and that the increase, in order to be taken into consideration, must be either permanent or likely to last for a considerable time.—Khajeh Abdul Gunny *v.* Bhattu Sheik, 22 W. R., 350. These principles have in effect been embodied in clause (*a*).

Enhancement by suit to be fair and equitable.

35. Notwithstanding anything in the foregoing section, the Court shall not in any case decree any enhancement which is under the circumstances of the case unfair or inequitable.

Extended to Orissa (Notification, June 27th, 1892).

All the provisions regarding enhacement of rent are subject to this section. Under no circumstances can a raiyat with a right of occupancy be called upon to pay more than a fair and equitable rent.—(Noor Mahomed *v.* Hari Prosunno, W. R., 1864, Act X, 75.) The occurrence of a catastrophe such as an inundation during the year succeeding a notice of enhancement was held to be sufficient to render the demand of a higher rent unfair and inequitable—(Bama Soondari *v.* Kaloo Peeadah, 10 W. R., 395), and in determining what is fair and equitable the Court may take into consideration the rise in wages; but it does not necessarily follow that, because wages are double what they were, and the necessaries of life have risen, that the old rent is fair and equitable under the altered state of circumstances.—Savi *v.* Jeeto Meeah, Marsh., 186. And as the existing rent is always presumed to be fair and equitable until the contrary is shown, it follows that a landlord who claims an increase of rent must clearly make out the grounds upon which enhancement is sought. The grounds too must be one or other of those stated in s. 30. This section should be read with s. 24 and notes. In Huro Prosad *v.* Chundee Churn, I. L. R., 9 Cal., 505; 12 C. L. R., 251, Wilson, J., observes: "When land is let for the purpose of clearing jungle or other reclamation,

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and on this ground, or any other ground mentioned in the lease, a reduced rent is provided for the first few years, and it is said that the rent is to be at such and such a rate, a sum as the full rent, does that mean, as the words seem to import, that the full rent is to be the full rent as long as the tenure subsists, or is such a rent liable to enhancement under the provisions of the rent law? We agree with the lower Appellate Court in thinking that the decision of the Privy Council in Sarada Sundari *v.* Golam Ali, 19 W. R., 65, is an authority for holding that the former view is the true one, and that in the present case the rent cannot be enhanced."

Power to order progressive enhancement.

36. If the Court passing a decree for enhancement considers that the immediate enforcement of the decree in its full extent will be attended with hardship to the raiyat, it may direct that the enhancement shall be gradual; that is to say, that the rent shall increase yearly by degrees for any number of years not exceeding five until the limit of the enhancement decreed has been reached.

Extended to Orissa (Not., June 27th, 1892).

Limitation of right to bring successive enhancement suits.

37. (1) A suit instituted for the enhancement of the rent of a holding on the ground that the rate of rent paid is below the prevailing rate, or on the ground of a rise in prices, shall not be entertained if within the fifteen years next preceding its institution the rent of the holding has been enhanced by a contract made after the second day of March, 1883, or if within the said period of fifteen years the rent has been commuted under section 40, or a decree has been passed under this Act or any enactment repealed by this Act enhancing the rent on either of the grounds aforesaid or on any ground corresponding thereto or dismissing the suit on the merits.

(2) Nothing in this section shall affect the provisions of section 373 of the Code of Civil Procedure. XIV of 1882.

Extended to Orissa, (Not., June 27th, 1892)

Sub-section (1):—The 2nd March, 1883, is the date on which leave to introduce the Bill to amend the rent law was obtained.

Reduction of rent.

38. (1) An occupancy-raiyat holding at a money rent may institute a suit for the reduction of his rent on the

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following grounds, and, except as hereinafter provided in the case of a diminution of the area of the holding, not otherwise (namely) :—

(*a*) on the ground that the soil of the holding has without the fault of the raiyat become permanently deteriorated by a deposit of sand or other specific cause, sudden or gradual, or

(*b*) on the ground that there has been a fall, not due to a temporary cause, in the average local prices of staple food-crops during the currency of the present rent.

(2) In any suit instituted under this section, the Court may direct such reduction of the rent as it thinks fair and equitable.

Extended to Orissa, (Not., June 27th, 1892).

The raiyat cannot contract himself out of the provisions of this section :—See s. 178 (3) (*f*).

The old Act:—The corresponding section of the old Act was thus worded : "Every raiyat having a right of occupancy shall be entitled to claim an abatement of the rent previously paid by him, if the area of the land has been diminished by diluvion or otherwise, or if the value of the produce or the productive powers of the land have been decreased by any cause beyond the power of the raiyat, or if the quantity of land held by the raiyat has been proved by measurement to be less than the quantity for which rent has been previously paid by him."—Section 19 of Act VIII of 1869 (B. C.) The grounds of abatement recognized by that section were :

1*st*.—Diminution of area by diluvion or otherwise.

2*nd*.—A decrease in the value of the produce of the productive powers of the land arising from causes beyond the raiyat's control.

3*rd*.—When the quantity of land held by the raiyat has been ascertained to be less than the quantity for which rent has been previously paid.

The present section takes only the second of these grounds, and puts back the other grounds in s. 52.

An occupancy-raiyat holding at a money-rent:—A suit for abatement will not lie unless the plaintiff admits that the relation of landlord and tenant exists between him and the person from whom the abatement is sought as to the lands in respect of which it is sought.—(Abhoy Gobinda *v*. Kenny, 8 W. R., 518). A raiyat who has held his land for a few months and has paid no rent at all, cannot sue for an abatement of rent.—(Brajanath *v*. Unantram, 17 W. R., 449). A raiyat not having a right of occupancy is not entitled to claim an abatement of rent under this section.—(Lalla Sheeb *v*. Nubadeep Chundra, 2 Hay., 430; Sheik Mohim *v*. Sheik

The person suing for abatement of rent must be a raiyat and a raiyat with a right of occupancy.

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Raheemotulla, 2 Hay., 433.) Although this section is confined to occupancy-raiyats it cannot be supposed that Act X of 1859 was intended to take away the right of abatement which had been enjoyed by all tenants before the passing of that Act; and it is a rule founded on the principles of natural justice and equity that if a landlord lets his land at a certain rent to be paid during the period of occupation, and the land is, by an act of God put in such a state that the tenant cannot enjoy, the tenant is entitled to an abatement. Therefore every tenant, whether with or without a right of occupancy, is entitled to abatement of rent for land washed away, unless precluded by the terms of his *kabuliyat* from claiming that abatement.—(Sheik Enyetulla *v.* Sheik Elahee, Sp. W. R., Act X, 42.) No doubt it is only an occupancy raiyat who is authorised by the Act to bring a suit under this section, but the principles in this section ought clearly to be taken into consideration in all proceedings for the settlement of rent, whatever the status of the raiyats:—Gouri Pattra *v.* Reily, I.L.R., 20 Cal., 579. A *putnidar* or any other lease-holder can claim abatement of rent under Act X of 1859—Huro Krishna *v.* Joikishen, 1 W. R., 299, F. B.; Prosonomoyi *v.* Soondarkumari, 2 W. R., Act X, 30.) This section applies only to occupancy-raiyats, but all raiyats and under-tenants, whether they have a right of occupancy or not, can claim an abatement of rent if they can show that they are entitled to it on principles of natural justice and equity. Section 23, Act X of 1859, cl. 3, conferred upon Collectors power to take cognizance of "all claims to abatement," whether preferred by occupancy-raiyats, farmers or under-tenants, and a Full Bench of the High Court has held that a suit for remission of rent, brought by a putnidar on the ground that certain portions of land included in his *putni* had been resumed as chakran by Government, would lie against the zemindar under Act X of 1859. "It is clear," observed the Court, "that a putnidar can be sued by the zemindar for rent under the fourth clause* of section 23, and it would be most inconvenient and unreasonable and indeed would be at variance with the plain meaning of the words 'all claims to abatement of rent' in the third clause, to hold that he is compelled to go to another Court to claim an abatement of his rent. (Hurro Kishen *v.* Joykishen, 1 W. R., 299, F.B.) A howladar or mokuraridar can sue for abatement of rent under the Rent Law.—(Mohesh Chunder *v.* Gungamoney, 2 Hay., 495; Kamalakanta *v.* Pogose, W.R., Act X, 65.) So also a talukdar is entitled to abatement, although not under the provisions of this section, which applies only to occupancy raiyats.—(Afsuroodeen *v.* Musst. Shuroshi Bala, 2 Hay., 664.) But it is doubtful whether a talukdar, whose tenure existed from before the Permanent Settlement, can claim abatement on the ground of diluvion.—(Ram Chunder *v.* Lucas, 16 W. R., 279.)

But under the general law all raiyats can claim abatement.

* Clause 4, s. 23 Act X of 1859, was as follows: "All suits for arrears of rent due on account of land, whether *kherajee* or *lakheraj* or on account of any rights of pasturage, forest rights, fisheries, or the like." This section was omitted from Act VIII of 1861, B. C.; but under s. 33, all suits which were cognizable by a Collector under Act X, were cognizable by the Civil Court under Act VIII of 1869, B. C.

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It is perhaps needless to observe, that zemindars are not entitled to claim an abatement of rent from Government on account of diluvion or any other cause, as the power of altering the public assessment is not vested by the Regulations in the Civil Courts of Judicature, but is reserved exclusively to the Executive Government. Bhowanee Persad *v.* Musst. Karoona Moyi, 2 Sel. Rep., 242, and S.D.R., 1852, p. 1094).

Zemindars cannot sue Government for abatement.

May institute a suit:—The old section was differently worded. Under that section the raiyat might either sue under this section for abatement of rent, or he may, when sued by his landlord for arrears of rent, claim an abatement by way of set off on account of remission of rent to which he is entitled—(Mohes Chunder *v.* Gunga Mani, 2 Hay.; Afsuruddin *v.* Musst, Shuroshi Bala, *id.*, 664; Dindoyal *v.* Thekroo *v.* Koonwar, 6 W. R., Act X, 24; Gour Kishore *v.* Bonomali, 22 W. R., 117). The present section seems, however, to giveonly a right of suit, but as this is a substantive provision, I think the raiyat has a right which he can as well assert in a suit by his landlord. The raiyat may also sue for abatement and refund of excess rents passed on account of diluvated lands.—(Barry *v.* Moulavi Abdool Ali, Sp. W. R., Act X, 64).

Can the raiyat claim the benefit of this section when sued by his landlord.

On the following grounds and except, &c., not otherwise:—Grounds of abatement are restricted to this section. Fraud on the part of a lessor does not constitute a valid ground for abatement. Thus, where a zemindar gave out an estate in putni, but concealed the existence of an intermediate under-tenure, the Court held that the *putnidar* was not entitled to an abatement of rent. In other words, that though the plaintiff might sue to be relieved of his contract, he could not sue for abatement under this section—(Shookur Ali *v.* Umola Ahaly, 8 W. R., 504.) In 1859, *G* entered into negotiations with respect to the purchase of a certain taluk at a premium of Rs. 42,411, and an annual rent of Rs. 48,070, and in January 1860 he signed a sale bond which obtained an enumeration of the mouzahs purchased, the actual sale being completed on the 2nd June following. Until his death in December 1861, he paid the stipulated rent, according to the terms of the deed. Subsequently his widow brought a suit for abatement of the rent on the ground that her husband had been misled as to the amount of rent payable by the under-tenants. *Held* (affirming the decision of the High Court) that under the circumstances the suit could not be maintained—(5 C. L. R., 465 P. C.) The only exception allowed is on account of diminution of area which is provided by s. 52. Hence reduction could not be claimed on the ground that the prevailing rate is lower. (Babun Mundle *v.* Sheo Kunwari, 21 W. R., 404). "Sections 18 and 19 of the old Act," however, it has been held, "were passed for the benefit of the raiyat and not for the protection of the zemindar. Section 18 says that no raiyat having a right of occupancy shall be liable to an enhancement of rent, except upon some one of the grounds therein specified, but section 19 is

Fraud.

Is the tenant restricted to the grounds of abatement mentioned in this section?

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differently worded. It enacts that any raiyat having a right of occupancy shall be entitled to claim an abatement of rent in any of the three cases mentioned therein, but it does not say that he shall not be entitled to an abatement upon any other grounds. Section 18 was to protect him from enhancement, and section 19 was intended to give him a right to abatement in certain cases, but not to protect the zemindar from liability to make abatement in any other case." Thus, where the jumma of a resumed lakheraj estate had been reduced by Government on the condition that the rents of the raiyats should be reduced in the same proportion, it was held that the raiyats were entitled to the benefit of the stipulation made by Government on their behalf at the time when the jumma was reduced. It was, however, added that the right of abatement in this case only applied to the case of rents of which the amounts had been fixed before the jumma was reduced by Government, and not to rents fixed by pottahs or *kabuliyats* subsequently entered into—(Sukhawatoollah *v.* Puthoo Goldar, 1 Ind. Jur., O. S., 7; Goluk Chundra *v.* Parvati Churun, 15 W. R., 168); such remission may be claimed in defence in a suit for arrears of rent—(Baikunta *v.* Surendranath, 1 W. R., 84). For further comment see notes under sub-clause (*b*) of (1) section 52 of the Act.

S. 92, Evidence Act.

A contemporaneous oral agreement cannot be proved under s. 92 of the Evidence Act to shew that the rent is less than what was stated in the registered kabuliyat, nor is the tenant entitled to give oral evidence of the subsequent acts and conduct of the parties:—Radha Raman *v.* Bhowani Prosad, 6 C. W. N., 61. The mere acceptance of a reduced rent, though it may amount to a full acquittance, cannot operate as a binding contract without proof of the agreement forming the basis of the reduction granted, and such an acceptance does not amount to such an agreement or release of a portion of the rent as to have a binding effect. (Per Gupta, J.); *Ibid.* Although oral evidence is not admissible for the purpose of contradicting a statement made in a registered *kabuliyat* as to the amount of rent, yet evidence is admissible to shew that, as between the landlord and the tenant, the *kabuliyat* was never intended to be acted upon or enforced or that there was a waiver of some of its terms. The evidence that since the execution of the *kabuliyat* the tenant paid rent at a lower rate than that stated in the *kabuliyat*, is admissible to shew that the intention of the parties was that the *kabuliyat* from the very first was not intended to be acted upon or that there had been a waiver by the parties:—Beni Madhub *v.* Lalmoti, 6 C. W. N., 242.

Permanently deteriorated by a deposit of sand &c:—"We think," observed the Chief Justice in Sheik Enyetullah *v.* Sheik Elahi Buksh, (Sp. W. R., (Act X), 42; 2 Board's Rep., 62), "upon principles of natural justice and equity, that, if a landlord lets his land at a certain rent, to be paid during the period of occupation, and the land is, by the act of God, put in such a state that the tenant cannot enjoy, the tenant is entitled to an abtement. * * * *. With regard to the land alleged to have been covered with sand, the Judge of the first Court will have to enquire if that portion was covered with sand, and thereby deteriorated or rendered wholly useless, by the

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act of God, the tenant will be entitled to an abatement, provided there was no stipulation to the contrary in the kabuliyat." The word "permanently" should be liberally interpreted and ought to be construed with reference to existing conditions; a deterioration may be permanent although the same might be removed by application of capital and skill:—Gouri Pattra *v.* Reily, I. L. R., 20 Cal. 579.

Without fault of the raiyat:—At the same time no raiyat can claim abatement unless the depreciation in the value of the land has resulted from causes beyond his control—(Munsoorali *v.* Harvey, 11 W. R., 291). For further discussion on this subject, the reader is referred to notes under clause (*b*) of section 52 of the Act.

Price-lists.

Price-lists of staple food-crops.

39 (1) The Collector of every district shall prepare, monthly, or at shorter intervals, periodical lists of the market-prices of staple food-crops grown in such local areas as the Local Government may from time to time direct, and shall submit them to the Board of Revenue for approval or revision.

(2) The Collector may, if so directed by the Local Government, prepare for any local area like price-lists relating to such past times as the Local Government thinks fit, and shall submit the list so prepared to the Board of Revenue for approval or revision.

(3) The Collector shall, one month before submitting a a price-list to the Board of Revenue under this section, publish it in the prescribed manner within the local area to which it relates; and if any landlord or tenant of land within the local area, within the said period of one month, presents to him in writing any objection to the list, he shall submit the same to the Board of Revenue with the list.

(4) The price-list shall, when approved or revised by the Board of Revenue, be published in the official Gazette; and any manifest error in any such list, discovered after its publication, may be corrected by the Collector with the sanction of the Board of Revenue.

(5) The Local Government shall cause to be compiled from the periodical lists prepared under this section lists of the average prices prevailing throughout each year, and shall cause them to be published annually in the official Gazette.

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(6) In any proceedings under this Chapter for an enhancement or reduction of the rent on the ground of a rise or fall in prices, the Court shall refer to the list published under this section, and shall presume that the prices shown in the lists prepared for any year subsequent to the passing of this Act are correct, "and may presume that the prices shown in the lists prepared for any yearprior to the passing of this Act are correct" (Act III B. C. of 1898), unless and until it is proved that they are incorrect.

(7) The Local Government, subject to the control of the Governor-General in Council, shall make rules for determining what are to be deemed staple food-crops in any local area and for the guidance of officers preparing price-lists under this section.

These provisions have been framed upon the principle of the *Tithe Commutation Acts*—See 6 and 7 Will. IV, Cap. 71; 7 Will. IV and 1 Vict., Cap. 69; 2 and 3 Vict., Cap. 15; 5 and 6 Vict., Cap. 54; 9 and 10 Vict., Cap. 75; 10 and 11 Vict., Cap. 164; 23 and 24 Vict., Cap. 93; see notes under s. 30, s. 32, ground (*b*) *ante*.

For rules under sub-section (7), see Appendix.

Commutation.

Commutation of rent payable in kind.

40. (1) Where an occupancy-raiyat pays for a holding rent in kind, or on the estimated value of a portion of the crop, or at rates varying with the crop, or partly in one of those ways and partly in another, either the raiyat or his landlord may apply to have the rent commuted to a money-rent.

(2) The application may be made to the Collector or Subdivisional Officer, or to an officer making a settlement of rents under Chapter X, or to any other officer specially authorized in this behalf by the Local Government.

(3) On the receipt of the application the officer may determine the sum to be paid as money-rent, and may order that the raiyat shall, in lieu of paying his rent in kind, or otherwise as aforesaid, pay the sum so determined.

(4) In making the determination the officer shall have regard to—

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(*a*) the average money-rent payable by occupancy-raiyats for land of a similar description and with similar advantages in the vicinity;

(*b*) the average value of the rent actually received by the landlord during the preceding ten years or during any shorter period for which evidence may be available; and

(*c*) the charges incurred by the landlord in respect of irrigation under the system of rent in kind, and the arrangements made on commutation for continuing those charges.

(5) The order shall be in writing, shall state the grounds on which it is made, and the time from which it is to take effect, and shall be subject to appeal in like manner as if it were an order made in any ordinary revenue proceeding.

(6) If the application is opposed, the officer shall consider whether under all the circumstances of the case it is reasonable to grant it, and shall grant or refuse it accordingly. If he refuses it, he shall record in writing the reasons for the refusal.

Extended to Orissa, (Not., Oct. 17th, 1896).

Under sec. 178, sub-section (3), cl. (g), nothing in any contract made after the passing of the Act can take away the right of either landlord or tenant to apply for a commutation of rent under this section. But it has been ruled that a landlord may demand payment of rent in kind in accordance with the original contract, although the tenant has paid rent in money for some years (Sohabat Ali *v.* Abdul Ali, 3 C.W.N., 151). Their Lordships (Ameer Ali and Pratt, JJ.), in delivering judgment said as follows :— "The contract between the parties is embodied in the registered *kabuliyat* under which the defendants hold the land, and if that contract is varied or put aside, it might not eventually be to the advantage of the defendants themselves, and if that is the contract under which the tenure is held, we must see what under the contract the rent was. Now, looking at the *kabuliyat*, it is perfectly clear that the defendants agreed to pay 41 *aris* of *dhan* as the rent of their holding. For the sake of convenience, or to meet the requirements of law, Rs. 10 was put down as the value of that *dhan*, and whether from indulgence, or for any other reason, the landlord chose to accept Rs. 10 for a number of years as representing the price of the 41 *aris*. The landlord now chooses to insist upon the enforcement of the contract under which the defendants hold their land, and we do not think we should be justified, merely on the

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ground that the 16 years the defendants have been paying only Rs. 10, in supposing that the original contract has been altered or varied.

The Board of Revenue have issued the following instruction under this section :—

Board of Revenue's instructions under the section.

The Board have reason to believe that misconception exists among some officers as to the requirements of the law under section 40 of the Bengal Tenancy Act, and that this has led to the rejection of applications for commutation of rents payable in kind on insufficient grounds, and the consequent discouragement of such applicatons. They desire, therefore, to point out that, subject to the grounds of his decision being recorded, and to an appeal, the officer dealing with an application under the section has full discretion to seek for such evidence, and make such inquiry, as he may deem necessary in order to determine the money-rent to be fixed. If the tenants are unable to produce receipts showing the quantity of produce previously received by the landlord, or its cash-equivalent and they will seldom possess such receipts—or the landlords file papers purporting to give previous outturns and divisions of the crops which the tenants repudiate, or which are apparently false, the applications should not necessarily be rejected, but the officer should endeavour to arrive at a fair estimate of the money-rent by recording and duly considering such oral testimony as may be produced by the parties, by reference to other sources of information, such as the cess papers of the estate, and, if necessary, by local inquiry conducted in person or through some other competent officer. Again, in determining the amount of the money-rent, the officer must be careful to take into consideration, not one only but all the matters mentioned in sub-section (4), save (*c*) whenever it has no application. A money-rent fixed on the basis of (*a*) only would ordinarily be too low, while one fixed on the basis of (*b*) only would ordinarily be excessive. Apart from any consideration due to (*c*), the officer is required to "have regard" to both (*a*) and (*b*), and to fix a rent which will be fair in comparison with both the average cash rent of the neighbourhood and the rent in kind hitherto realized for the land. Unless the landlord has undertaken to maintain means of irrigation, in which case (*c*) would apply, it must be borne in mind that, as the rent ceases to vary with the outturn and becomes fixed, the risk of the seasons falls on the tenant alone, and the rent should therefore be such as, taking the seasons (good and bad) one with another, he will be capable of meeting and may therefore be reasonably imposed on him.

The Board of Revenue have ordered that, when an application for commutation of rent payable in kind is opposed on the ground that the rent is not in fact payable in kind, it is the duty of the officer to whom the application is made to enquire into the question, and if he finds it in the affirmative he is bound to proceed to deal with the application.—Board's Letter No. 662A, 30th June, 1888 to Government of Bengal.

Sub-section (4):—"We have in s. 40 included among the matters to be taken into consideration by an officer commuting rent, the charges incurred by the landlord in respect of irrigation under the system of rent-in-kind and the arrangements made on commutation for continuing those charges." (*S. C. B. III*).

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"Tithes were formerly paid in kind, *i. e.*, the person entitled to the tithe received a tenth of the crop. This system was found to be vexatious in the extreme, and productive of disputes and litigation, just as the system now in force in parts of Behar produces constant irritation and oppression. It was finally decided to be a source of so much bitterness and want of charity, that the following rules were laid down for the conversion of tithes into a money-payment: (1) find the gross average-money-value of the tithe of a parish or district for seven years ending on Christmasday of 1835; (2) apportion the amount of that value upon the lands of the several tithe-payers; (3) ascertain how much corn could be purchased with such amount, one-third of it to be laid out in wheat, one-third in barley, one-third in oats, at the average price of corn for the seven years preceding 1835; (4) in every future year make payable the price of the same quantity of wheat, barley and oats at their average prices founded on a like calculation of the official returns for the seven years ending at each preceding Christmas."—Field's Digest.

In a set of unreported cases (Musst. Fasihun *v.* Dursan Singh) of Patna which were analogous, the High Court has held that where the rent-in-kind was changed into a money-rent and the occupancy-raiyats paid that money-rent for some years, but it did not transpire that the landlords abandoned their rent-in-kind altogether, they may sue again to revert to the old *bhaoli* rent. As we have observed under s. 30, this principle, which even is a very questionable one, will not hold good under the present law.—(See Yakoob Hossein *v.* Shaik Chowdry Wahid Ali, 4 W. R., Act X, 23, *per* Trevor, J.; and also Thakoor Persad *v.* Nawab Syad, 8 W. R., 170.) In these cases it has been held that a conversion of rent-in-kind into money-rent was feasible under s. 18 of Act VIII of 1869 (B.C.) and that the *bhaoli* mode of payment was a retrograde system.

Sub-section (5):—The provisions of cl. 5 are imperative and should be strictly complied with before an order under this section can have any effect. The object of requiring the time from which the order is to take effect to be stated is to enable the parties distinctly to know from what date the new arrangement is to come into operation. In the absence of any date being fixed in the order, the order must be taken to be practically inoperative, or at any rate, to remain in suspense until it is amended by the specification of the time of its operation. The omission to specify the time may be inadvertent but it is the business of the parties in order to avail themselves of the effect of the order, to have the time specified:—Chowdhry Raghunath *v.* Dadha, I. L. R., 18 Cal., 469.

Appeals under the section.

An appeal lies under sub-section (5) against an order determining the amount of money-rent under sub-section (3). The appeal is from the order of a Sub-divisional officer to the Collector, from the Collector to the Commissioner, and from the Commissioner to the Board of Revenue, as in other revenue proceedings; and an order passed on appeal under sub-section (5) by the Revenue Authorities has been held to be final and no suit lies in the civil court, by which its propriety can be questioned.—Lala Saligram *v.* Mohunt Ramgir, 3 C. W. N., 313. The period of limitation for

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an appeal to the Commissioner from an order of the Collector under this section is 30 days—see Sched. III, Art. 5, *post*.

No appeal from order under sub-section (6).

The Board of Revenue have declared that there is no appeal to the Revenue Authorities from an order refusing an application under sub-section (6). Sub-section (5), it was said, clearly and specifically gives a right of appeal against an order of commutation under that sub-section, while sub-section (6) does nothing of the kind. If the legislature had intended to give an appeal in the latter case, there would have been a definite provision with that object.—Board's Memo. 706 A, 30th July, 1895. The Commissioner has, however, the same general powers of control in such cases as he has in other matters not distinctly judicial.—(see Chapter I, Rule 2 of the Govt. Rules, Appendix.)

For enquiries under this section, Revenue officers are to receive travelling allowance in the ordinary way from the Government and the applicants are to pay costs of *amins* required.—Board's letter 895 A, 3rd Novr., 1902, to Government; Government order No. 4125, 26th Novr. 1902 to the Board.

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CHAPTER VI.

NON-OCCUPANCY-RAIYATS.

Application of Chapter.

41. This Chapter shall apply to raiyats not having a right of occupancy, who are in this Act referred to as non-occupancy-raiyats.

"Under the law as it stood before the Bengal Tenancy Act was passed, non-occupancy raiyats not holding under any express engagements were treated as tenants-at-will or as tenants from year to year." *Per* Banerjee, J., in Karim Chowkidar *v.* Sunder Bewa, 1 C. W. N., 89; I. L. R., 24 Cal., 207.

Under old law a non-occupancy raiyat is tenant-at-will.

Ordinarily a non-occupancy holding is not heritable—Karim Chowkidar *v.* Sunder Bewa, I. L. R., 24 Cal., 207; 1 C. W. N., 89. But by custom or local usage it may be transferred (see section 183, *post*) or bequeathed: in other words, it may be dealt with either *inter vivos* or by a testamentary disposition; and nothing in a contract made after the passing of the Act can take away the right of the tenant to transfer or bequeath the holding in accordance with local usage [see section 178 (3), clause (*d*), *post*]. Similarly, he can sub-let his holding (section 85, *post*) and his right to do so cannot be taken away by any contract made after the passing of the Act [section 178 (3), clause (*e*), *post*].

Non-occupancy holding ordinarily not heritable.

Rights possessed by a non-occupancy-raiyat under custom or local usage cannot be taken away by contract.

Section 116, *post*, excludes certain kinds of land from the purview of Chapter VI. The provisions of the chapter, therefore, do not apply to the private lands of a proprietor known as *sirat*, *nij jote*, &c., held "under a lease for a term of years or under a lease from year to year;" but the qualification, *viz.*, when they are held "for a term of years or from year to year" must be carefully borne in mind. Under section 180 (2), *post*, the provisions of Chapter VI do not apply to lands held under the *utbandi* system. "No doubt it is only an occupancy-raiyat who is authorized by the Act to bring a suit under section 38, but the principles laid down in that section ought to be taken into consideration in all proceedings for the settlement of rent, whatever the status of the raiyat."—Gouri Patra *v.* Reily, I. L. R., 20 Cal., 586.

Land excluded from operation of Chapter VI.

Tenants let into land by persons having no title therein, if *bonâ fide* cultivators and not themselves tort feasors, acquire a right of remaining on the land subject to payment of rent, and cannot be ousted from their holding except in accordance with the provisions of the Act:—Mohim Chundar *v.* Huzari, I.L.R., 17 Cal., 45; Binode Lal *v.* Kalu I. L. R., 20 Cal., 708, F. B. Unless the land comes within the purview of section 107 of the Transfer of Property Act (Act IV of 1882):—Lal Sheo Charan *v.* Purbhu

Non-occupancy raiyats under trespassers.

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Doyal 1 C. W. N., 142. Where certain co-sharer landlords, claiming an exclusive title to certain land, settled the same with a tenant, in a suit for rent brought by the other proprietors, it was *held* that the tenant could not be treated as a trespasser, and that the plaintiffs were entitled to claim rent from him for use and occupation :—Azim *v.* Ram Lal, I. L. R., 25 Cal., 324.

Tenant let into the land by co-sharer landlords.

But when a tenant encroaches upon the land of his landlord, he does not, by such encroachment, acquire the status of a tenant in respect of the land encroached upon against the will of the landlord.—Prahlad *v.* Kedar Nath, I. L. R., 25 Cal., 302.

Tenant encroaching upon the landlord's lands.

42. When a non-occupancy-raiyat is admitted to the occupation of land, he shall become liable to pay such rent as may be agreed on between himself and his landlord at the time of his admission.

Initial rent of non-occupancy-raiyat.

43. The rent of a non-occupancy-raiyat shall not be enhanced except by registered agreement or by agreement under section 46 :

Conditions of enhancement of rent.

Provided that nothing in this section shall prevent a landlord from recovering rent at the rate at which it has been actually paid for a continuous period of not less than three years immediately preceding the period for which the rent is claimed.

Extended to Orissa, (Not., Sepr. 10th, 1891).

44. A non-occupancy-raiyat shall, subject to the provisions of this Act, be liable to ejectment on one or more of the following grounds, and not otherwise, (namely) :—

Grounds on which non-occupancy-raiyat may be ejected.

(*a*) on the ground that he has failed to pay an arrear of rent;

(*b*) on the ground that he has used the land in a manner which renders it unfit for the purposes of the tenancy, or that he has broken a condition consistent with this Act and on breach of which he is, under the terms of a contract between himself and his landlord, liable to be ejected ;

(*c*) where he has been admitted to occupation of the land under a registered lease, on the ground that the term of the lease has expired :

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(*d*) on the ground that he has refused to agree to pay a fair and equitable rent determined under section 46, or that the term for which he is entitled to hold at such a rent has expired.

Extended to Orissa, (Not., Sepr. 10th, 1891).

This section is subject to the provisions of s. 89, *post*. Mere non-payment of rent does not determine the tenancy; see p. 8, *ante*, and a non-occupancy-raiyat cannot be ejected except in execution of a decree (s. 89), and under the provision of s. 66, he can always save himself from ejectment, even after the decree, by paying the amount of the decree with costs within 15 days in period of grace. A non-occupancy-raiyat is liable to ejectment either (1) for default of rent (*cl. a*), or (2) for breach of condition of the tenancy (*cl b*). or (3) on the expiration of the term of a registered lease, (*cl. c*), or (4) on his refusal to pay a fair and equitable enhanced rent determined under s. 46 (*cl. d*), or (5) on the expiration of the term for which the rate settled under s. 46 holds good. When the tenant is not admitted under a registered lease, *i.e.*, when he settles verbally or under an unregistered deed, this section provides for no rule of eviction, and the words "*not otherwise*" read with cl. (*c*) of sub-s. (1) of s. 178 seem to imply that in these hypothetical cases no eviction will take place. The first of these grounds is limited by s. 66, third by s. 43, and the fourth and fifth by s. 46. It should be observed, however, that the last clause of sub-cl. (*d*) admits of a wider meaning. Clause (*b*) of section 44 must be read in conjunction with section 155, sub-section (1), *post*, which prescribes the procedure for the institution of a suit for the ejectment of a tenant on the ground that he has broken a condition on breach of which he is, under the terms of his contract with the landlord, liable to ejectment. Clause (d) must be read with s. 46 (7) and (8) *post*.

Clause (b) :—In a case arising in a district where Act X of 1859 was in force, it was found that the tenant defendant had been in occupation of the land since 1876, and had consequently acquired rights of occupancy. One of the conditions of his lease was that, in the beginning of the Bengali year 1286, he was to take an *Amin* from the landlord's *serishta* and get the lands measured and a *jamabandi* of the *naiabadi* lands made; he failed to apply for an *Amin* in 1286; it was held that there was a breach of contract and the zemindar was entitled to khas possession.—Nobin Manjhi *v.* Raj Kumar Gourilal Sing, 6 C. W. N., 199.

Clause (c):—For "admitted to occupation" see s. 47. Clause (c) provides for the ejectment of a raiyat admitted to occupation under a registered lease, on the ground that the period for which the tenancy was created has expired. This is controlled by the provisions of the following section, which require, as a condition precedent to the institution of a suit, the service of notice "not less than six months before the expiration of the term." The section does not, however, provide for any rule of eviction in the case of tenants admitted into occupation under verbal agreement or unregistered lease. A non-occupancy raiyat admitted to the occupa-

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tion of land on a verbal lease, or one who is allowed to hold on for six months after the expiry of the term of a registered one,(see sec. 45), therefore, cannot be ejected so long as he pays the rent, does not misuse the land, or break his contract or refuse to pay such an enhanced rent as a Court may consider fair and equitable. In a case in which it was sought to eject a tenant from certain homestead land, held as part of a raiyati holding, under a lease which contained a stipulation that the tenant would quit whenever the landlord called upon him to do so, it was ruled that sec, 44, cl. (*c*), only applied when a lease is granted for a fixed term, and that under sec. 178, sub-sec. 1, cl. (*c*), the stipulatton in the lease could not be enforced (Nando Kumar Guha *v.* Kali Kumudini Haji, 3 C. W. N., xlvii).

Disclaimer.—See pp. 142 to 145 *ante*. In earlier cases decided under the old law, the disclaimer or denial by the tenant of the landlord's title did not work a forfeiture of the tenancy, but later decisions expressed a different view and held that such a denial furnished a ground for ejectment. Since the passing of the present Act, in any case to which it applies there cannot be any eviction on the ground of forfeiture incurred by denying the title of the landlord, that being a ground not enumerated in the Act and therefore expressly excluded by section 178, *post*.—Chandra Mohun *v.* Bisseswar, 1 C.W.N., 158. But where the denial took place before the Act came into operation, the forfeiture being complete before the passing of the Act, it was held that the case was not to be affected by section 178, and was governed by the old law.

Even in cases governed by the old law a denial must be explicit, and not in the suit itself, to work a forfeiture. An assertion or denial of a right in a written statement does not give rise to a cause of action, which must be antecedent to any allegation made in the pleadings.—Madan Mohan *v.* Rajab Ali, I.L.R., 28 Cal., 223. In Nizamuddin *v.* Mumtazuddin, I. L. R., 28 Cal., 135 it has been held that, although in a district where the relations of landlord and tenant were regulated by the provisions of Bengal Act VIII of 1869 a tenant denying his landlord's title forfeited his tenancy, yet a penal provision of this character could only be enforced upon an express denial; such a denial must not be inferential or proceed upon an *ex post facto* circumstance. A denial in the written statement would not operate as a forfeiture. The same principle applies to a denial by an under-raiyat.—Dhora *v.* Ramjeeban, I. L. R., 20 Cal., 101. Where, however, the land is found to belong to the plaintiffs and the defendants persist in denying their title as well as their right to recover rent, through three successive suits, the position is different.—Nil Madhub *v.* Anantram, 2 C. W. N., 755; Faiz Dhali *v.* Aftabuddin, 6 C. W. N., 575.

Transfer of non-occupancy holding:—A transfer by the raiyat of the whole or part of a holding does not cause forfeiture of the tenancy or entitle the landlord to eject the raiyat, so long as he does not disclaim his interest in the holding and continues to pay the rent for it.—Kabil Sardar *v.* Chandra Nath Nag Chowdhri [1892], I. L. R., 20 Cal., 590; Bansi Das *v.* Jagdip Narain Chowdhuri [1896], I. L. R., 24 Cal., 152; Shaikh Gozaffur Hossain *v.* Dabbish [1896], 1 C. W. N., 162; Chandra Mohun Mukhopadhya *v.* Bissesswar Chatterji [1892], 1 C. W. N., 158.

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Nor does the transfer by an occupancy raiyat of a part of his holding give any right to the landlord to recover by ejecting the transferee, in the absence of evidence to show that by custom such transfer is allowed so as to sever the holding into two parts.—Durga Parsad *v.* Dahla Ghaze, 1 C. W. N., 160. But when a tenant transfers his non-transferable holding, abandons possession, and ceases to pay rent for it, or when he transfers the holding and accepts a new tenancy from the transferee, ceasing himself to pay rent for the transferred holding, the landlord is entitled to eject the transferee.—Robert Wilson *v.* Radha Dulari, 2 C.W.N., 63; Kali Nath Chakravarti *v.* Upendra Chandra Chowdhuri [1896], I. L. R., 24 Cal., 212; 1 C. W. N., 163; see also Narendra Narain Ray Chowdhury *v.* Ishan Chunder Sen [1874], 14 B. L. R., 274; S. C., 22 W. R., 22. In Pandab Nath *v.* Durga Churan, 2 C. W. N. clv, note, it was held that a landlord cannot eject a tenant who has transferred a part of his holding, remaining in possession of the other part. But some doubt was thrown on the correctness of this view in the case of Maharaja Kishen Pertab Sah Bahadur *v.* Tripe; 2 C. W. N., clv. and the question whether the transfer of a portion of the holding worked a forfeiture, so far as that portion was concerned, was referred to a Full Bench. The Full Bench, however, finding that there was no evidence on the record to prove that the tenant had refused to pay rent for the portion sold by him, did not consider it necessary to answer the question referred.—*Ibid.*

Ameliorating waste causes no forfeiture :—The commision of an act of what is called "ameliorating waste" will not give the landlord the right of ejecting the tenant, where a tenant has taken lease of an old settled up tank from a co-sharer landlord and re-excavated it, without the consent of the other landlords, they would have no right of ejectment. They would only be entitled to their share of rent.—Modan Mohun *v.* Rajab Ali, I. L. R., 28 Cal., 223.

Limitation :—A suit is to eject a tenant on the ground that he has used the land comprised in his holding in a manner which rendered it unfit for the purposes of the tenancy is governed by Act 32 of Sch. II, of the Limitation Act :—Soman Gope *v* Raghubir, 1 C. W. N., 223 : I. L. R., 24 Cal., 160; Sharoop Das Mandal *v.* Jogessur Roy, I.L.R., 26 Cal., 565. A suit under the latter part of cl. (*b*) is governed by one year's limitation; see Sch. III, art 1.

Court-fee.—In a suit to eject a defendant as being a tenant-at-will the Court-fee upon the plaint or memorandum of appeal is 8 annas, under Sch. II, cl. 5 of Act VII, 1870. Cl. XI (*d*) of s. 7 of that Act applies only to suits brought by a tenant to dispute the validity of his landlord's notice to quit.—(Bibi Nurjahan *v.* Morfan Mundle, 11 C. L. R., 91.) "It is clear," says Garth, C.J., "that clause XI (*d*) of section 7 does not apply. I agree with the Deputy Registrar that this clause applies only to suits brought by a tenant to dispute the validity of his landlord's notice to quit. There is more reason in the argument that the suit is brought to recover possession of land under clause IV of section 7. But it hardly comes within the true meaning of that clause; because the landlord is already in possession

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in one sense through his tenant, the defendant, and the object of the suit is merely to put an end to that tenant's interest. The value of the suit would therefore be the difference between the value of the landlord's interest, whilst the tenancy continues, and its value, when the tenant's interest has been terminated. It would be certainly very difficult to estimate the value of that difference, and if it were necessary to do so, I would say that Rs. 10 would be the proper stamp fee. But it seems to me that cl. (5) of Sch. II solves the difficulty. The plaintiff's real object seems to be to defeat the defendant's claim to the land as an occupancy-raiyat, and if so, the suit is brought to contest a right of occupancy. The proper stamp fee will therefore be 8 annas." It has been judicially determined by a Full Bench of the High Court (Sutherland's Full Bench Cases) that such an application, as is made under s. 25 of Act X of 1859 for the assistance in ejecting a raiyat, is not a suit. The Revenue Courts should therefore receive such applications upon a stamp of 8 annas.—(Peary Mohun *v.* Kena Bewa, 11 W. W., 90.)

45. A suit for ejectment on the ground of the expiration of the term of a lease shall not be instituted against a non-occupancy raiyat unless notice to quit has been served on the raiyat not less than six months before the expiration of the term, and shall not be instituted after six months from the expiration of the term.

Conditions of ejectment on ground of expiration of lease.

Read this section with s. 44 cls. (*c*) and (*d*).

The application of this section does not seem to be limited to cl. (*c*) of s. 44. Here the word used is 'lease,' and the section does not speak of 'registered or unregistered lease.' The object of the provisions is that a tenant of a fixed term should know six months before that his landlord will not suffer him to continue his holding, while if the landlord suffers him to continue more than six months after the expiration of the lease, the presumption is that he has no intention or has abandoned his intention to terminate the tenancy, and that notwithstanding a notice to quit has been served six months before the expiry of the lease. Hence if a notice to quit has been served six months before the expiry of the lease, but the suit is instituted more than six months after the expiry, the notice goes for nothing.

The status of a tenant after the expiry of his lease:—The suit in ejectment only is not to be instituted unless a notice is served, but after the expiry of the lease, and before the notice is served, in what light is the tenant holding on to be looked at? Is he to be treated as a trespasser or as a tenant? What is his status? Section 116 of the Transfer of Property Act solves this question. See s. 51 *post*. It has been held that a tenant who holds over after the expiration of lease does so on the same rent and terms as before.—(Sheik Enyutullah *v.* Sheik Elahie Buksh, Sp. W. R., Act X, 42; 2 R. J.

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P. J., 204; Tarachunder *v.* Amir Mundal, 22 W. R., 394; Sreemuty Altab *v.* Joogul Mundal, 25 W. R., 234.)

When an agricultural tenant holds over after the expiration of his lease his tenancy is renewed from year to year. And the tenant continues upon his holding on the same stipulations as in the original lease, subject to the condition that they are consistent with the Act. The mere fact, therefore, that the lease has expired and the tenant is holding without the express consent of the landlord, is not sufficient to constitute him as a trespasser, nor can he be ejected without a sufficient and reasonable notice determining the tenancy—Gobordhone *v.* Karuna, I.L.R., 25 cal., 75.

Mode of service of notice:—The Local Government has prescribed the following mode of service of a notice under this section:—"Section 45. Notice to a raiyat to quit under this section shall be served through the Court having jurisdiction to entertain a suit for ejectment from the holding in the manner prescribed for the service of the summons on a defendant under the Code of Civil Procedure and shall be subject to the same process fee." See Appendix.

Notice to quit:—This section now settles the period of notice to which the non-occupancy-raiyat is entitled, and the time when such notice should expire; and it will apply to a raiyat holding a homestead as a part of his holding when there is no local custom or usage regulating it (see s. 182 *post*, and notes). But when the homestead is held not by a raiyat or by a raiyat as not a part of his holding, the question of notice and its reasonableness becomes complicated. In such cases the following will be useful.

Section 106 of the Transfer of Property Act runs thus: "In the absence of a contract, a local law or usage to the contrary, a lease of immovable property for agricultural or manufacturing purposes, shall be deemed to be a lease from year to year, terminable on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy; and a lease of immovable property for any other purpose shall be deemed to be a lease from month to month, terminable on the part of either lessor or lessee, by 15 days' notice expiring with the end of a month of the tenancy. Every notice under this section must be in writing, signed by or on behalf of the person giving it, and tendered or delivered either personally to the party who is intended to be bound by it, or to one of his family or servants at his residence, or (if such tender or delivery is not practicable) affixed to a conspicuous part of the property." A raiyat who has held without any period having been fixed for the duration of his tenancy, although he may not have gained a right of occupancy, cannot have his holding determined without reasonable notice to quit; and a notice given in the last month of a current year would not be sufficient.—(Bakra Nath *v.* Binode Ram, 10 W. R., 33 F. B.) According to s. 8, Act VIII of 1869 (B. C.) the landlord has a right to make his own terms with the tenant or to turn him out of occupation by serving him with a reasonable notice to quit unless he agrees to pay the rent required —(Janoo Mundur *v.* Brijo Singh, 22 W. R., 548). Such notice need not be confined to a simple demand of possession and notice to quit on a certain day. It is sufficient

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if the landlord asked for a higher rate of rent and gave the raiyat notice to quit if he declined to pay it.—(Hem Chunder *v.* Radha Prosad, 23 W. R., 440.) A tenant-at-will who has been served duly with a notice to quit, may be successfully sued for ejectment.—(Abdool Kareem *v.* Omer Chand, 24 W. R., 461.) In Rajendra Nath *v.* Bassider Rahman, I. L. R., 2 Cal., 146, F. B.; 25 W. R., 329, F. B., the referring Judge (Markby, J.) observed: "It is, I think, clear upon the authorities that he could not have been ejected without a reasonable notice to quit and then only at the end of the year.—(Bakra Nath *v.* Binode Ram and Janoo Mundul *v.* Brija Singh.) And unless his tenancy has been put an end to by his present litigation, it is still subsisting. This last point is one upon which the doubt arises in consequence of a decision in Hem Chunder *v.* Radha Persad. There the learned Judges, whilst recognizing the right of the tenant to a reasonable notice to quit, expiring at the end of the year, seem nevertheless to consider that the institution of a suit is itself a sufficient demand of possession for the purpose of maintaining the suit, and that the tenant's claim for a reasonable notice, expiring at the end of the year, will be satisfied by fixing such a date for giving up possession as will be fair towards himself. If that be so, I do not think the plaintiff in the present case could recover possession; he would only be entitled to some compensation for having been ejected too soon. But with very great deference, I cannot bring myself to think that the decision I have referred to is correct. I do not see how the landlord, who has not determined the tenancy by a proper notice, can recover in ejectment. Even in the case of a tenancy-at-will, it is necessary under English law that the will should be determined.—Doe de Jacobs *v.* Philips, 10 Q. B., 130, where it was argued that the will was determined by bringing the action, but the Court held that it was not so. The case of a raiyat whose tenancy can only be determined at the end of the year by a reasonable notice to quit is a much stronger one. It seems to me impossible to consider such a raiyat otherwise than as a tenant from year to year. I do not say that the incidents of the tenancy are precisely the same as those of a yearly tenancy in England. But I cannot think that the raiyat can be ejected without a proper notice to quit. The case of Hem Chunder *v.* Radha Persad, is based upon the decision in Mahomed Rasid *v.* Jadoo Mirdha (20 W. R., 401), but I am strongly disposed to think that the learned Judges did not there intend to lay down any proposition of law at all. I think that decision only carries out a suggestion made by the Court for the benefit of the parties, and in order to avoid further litigation." The judgment of the Full Bench was delivered by Garth, C. J.: "We are of opinion that in the case of a raiyat of the class specified in the question referred to us, *i. e.*, a raiyat whose tenancy can only be determined by a reasonable notice to quit expiring at the end of the year, the raiyat can claim to have a suit for ejectment brought against him by his landlord dismissed on the ground that he has had no such notice." Proceedings in a Criminal Court under s. 53 of the Code of Criminal Procedure are not a sufficient demand of possession for the purpose of maintaining an ejectment suit.—(Ramruttun *v.* Nritya Kali, I. L. R., 4 Cal., 339.) There is no difference in law between the position of a raiyat holding without a pottah, and that of one holding over after the expiry of the term covered by a pottah, with

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the consent of his landlord and both are entitled to a notice to quit.—(Chatoori Singh *v.* Makund Lal, I. L. R., 7 Cal., 170; Ram Khelawan Sing *v.* Musst. Soondra, 7 W. R., 152.) A notice to quit running only for ten days and terminating on the 25th Jeyt is not a sufficiently reasonable notice on which a landlord can maintain a suit in ejectment against a tenant from year to year.—(Ramruttun *v.* Nritya, 4 Cal., 339.) A notice to quit within thirty days, served by a landlord on his tenant, at a time when the crops are ripening, is unreasonable and insufficient. Where such a notice was given, the Court refused to determine what would have been a sufficient notice, and to make a decree to take effect at a future date on the basis of such notice.—(Jubraj Roy *v.* W. Mackenzie, 5 C. L. R., 231.) A tenant, other than an occupancy-raiyat, is entitled to a reasonable notice to quit. "What is reasonable notice is a question of fact which must be decided in each case according to the particular circumstances, and the local customs as to reaping crops and letting land. In the present case a three months' notice was given; there was no contention that, at the time when that notice expired, any crop was upon the ground, the necessity of removing which would have made the notice under the circumstances unreasonable. Further, the notice did, as a matter of fact, expire within seven days of the close of the year." *Per* Field, J.—The notice in the case was found good.—(Juggut Chunder *v.* Rup Chand, I. L. R., 9 Cal., 48.) There is no authority for the proposition that a notice to quit to a raiyat other than an occupancy-raiyat must terminate at the end of a cultivating year or by a three months' notice. Such raiyat is only entitled to a 'reasonable' notice and such as will enable him to reap his crop; what is a reasonable notice is a question of fact to be decided in each case having regard to its particular circumstances, and the local customs as to reaping and tilling land.—(Radhagovinda *v.* Rakhal Das, I. L. R., 12 Cal., 82.) It is not necessary that the period allowed in a notice to quit by a landlord to his tenant should terminate at the end of the year, but the notice must be in respect of the date of determination of the tenancy as well as in other respects to a reasonable notice. A notice to quit served on the 26th Pous, and allowing two months to the tenant to vacate his holding, such period thus expiring on the 26th Falgun, when it appeared that cultivation began in the months of Magh and Falgun, and that they were the months for tilling out land in the district, it was held not to be a reasonable notice.—(Bidhumukhi *v.* Kefyutullah, I. L. R., 12 Cal., 93.) "There is no law in this country which requires a notice to quit, to expire at the end of the year, and there is no law which requires six months' notice to be given."—*Per* Field J. (Kali Kishen *v.* Golamali, I. L. R., 13 Cal., 3.) Where the tenancy is an annual tenancy and the rent is payable at the end of the year, the tenant is entitled to have a notice calling upon him to quit "at the end of a year" of tenancy.—Hunnan Giri *v.* Sri Govinda I. L. R., 29 Cal., 203. Where a notice was served by post upon the tenant to quit certain *khudkasht* lands that were alleged to be in his wrongful possession, a suit by the landlord for his ejectment from the lands was dismissed on the ground that the notice was bad in law and the action based upon it must fail.—Lala Makhan Lal *v.* Lala Kuldip, I. L. R., 27 Cal., 774. It has been held,

Reasonableness of notice.

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however, that a trifling error in the statement of area in the notice, especially when the defendant does not raise any objection that he was misled by it, would not vitiate the notice.—Shama Churan *v.* Uma Churan, I. L. R., 25 Cal., 36; 2 C. W. N., 106. In a tenancy created by a kabuliyat with an annual rent reserved, a six months' notice to quit requiring the tenant to vacate the holding within, instead of on the expiry of, the last day of a year of the tenancy, has been held to be a good notice in law, inasmuch as there was no appreciable interval between the expiry of the notice and the end of a year of the tenancy.—Ismail Khan *v.* Jaigun I. L. R., 27 Cal., 570; 4 C. W. N., 210. When a raiyat surrenders his tenancy, an under-raiyat who is not protected by section 85 or section 86, cl. (*b*), is not entitled to notice to quit, before the landlord can sue to eject him.—Nilkanta *v.* Ghatu Shaik, 4 C. W. N., 667. The validity of a notice to quit may be questioned for the first time in the course of a second appeal to the High Court.—Gouri Sunkar *v.* Najubut, 1 C. W. N. clxxix. A notice in the alternative form to quit land or pay enhanced rent was adopted by Phear, J., in Jumoo Mundur *v.* Brijo Singh (22 W. R., 548). But the correctness of this decision was doubted by Garth, C. J., in Mahamaya *v.* Nil Madhub I. L. R., 11 Cal., 533. The learned Chief Justice observed: "Now in the first place I am not aware of any other case in which this ruling of Phear, J., has been approved. It was an extra judicial opinion, not necessary for the purposes of the case then under consideration, and I think it may be well doubted whether a tenant, after such alternative notice continuing in occupation of the land, would be liable to pay the enhanced rent claimed. * * *. A notice to quit ought to be clear and unambiguous. This is the English rule, and it seems to me a sensible one, but it is necessary under the cricumstances to decide that point." In the same case, however, McDonell, J., dissented from the Chief Justice and remarked "I am doubtful whether in this country a notice by which a tenant is given his option either to pay an enhanced rent from a certain day or quit, should be held to be insufficient and invalid (see Ahearn *v.* Billman, L. R, 4 Ex. D., 202). I do not know of any cases in which this has been held, and certainly notices in this form have been not unfrequently given by landlords in this country." The learned Chief Justice seems to have overlooked a few other decisions on the same point. In Budun Molla *v.* Khetter Nath (20 W. R., 441), Markby, J. observed "According to English law, it would, I believe, be necessary for the landlord to give a positive notice to quit before attempting to raise the rent; but having done that he could negotiate for a new letting on any terms he pleased, and if the tenant held on without any new agreement being come to, the landlord could recover for the occupation at a fair rate. The only difference, therefore, is between a notice to raise the rent and a notice to quit. I do not think that these two notices substantially differ. I think a notice to raise the rent does in fact put an end to the tenancy on the existing terms, and that it leaves the tenant at liberty to quit his holding at the end of the year if he does not choose to pay the rent demanded."—(Compare Kylash Chander *v.* Woomanund, 24 W. R., 413; Hurry Doyal *v.* Ram

Alternative notice.

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Nidhi, I Shome's Law Reporter, 161). Where several co-sharers have served a joint notice to quit upon which notice they jointly institute a suit for the recovery of the land, the fact that one of the plaintiffs withdraws from the suit will not prevent the remaining plaintiffs from obtaining a decree for possession of their shares of the land.—(Dwrkanath *v.* Kali Chunder, I. L. R., 13 Cal., 75). See notice under s. 182.

Notice of co-sharers.

46. (1) A suit for ejectment on the ground of refusal to agree to an enhancement of rent shall not be instituted against a non-occupancy raiyat unless the landlord has tendered to the raiyat an agreement to pay the enhanced rent, and the raiyat has within three months before the institution of the suit refused to execute the agreement.

Conditions of ejectment on ground of refusal to agree to enhancement.

(2) A landlord desiring to tender an agreement to a raiyat under this section may file it in the office of such Court or officer as the Local Government appoints in this behalf for service on the raiyat. The Court or officer shall forthwith cause it to be served on the raiyat in the prescribed manner, and when it has been so served, it shall for the purposes of this section be deemed to have been tendered.

(3) If a raiyat on whom an agreement has been served under sub-section (2) executes it, and within one month from the date of service files it in the office from which it issued, it shall take effect from the commencement of the agricultural year next following.

(4) When an agreement has been executed and filed by a raiyat under such sub-section (3), the Court or officer in whose office it is so filed shall forthwith cause a notice of its being so executed and filed to be served on the landlord in the prescribed manner.

(5) If the raiyat does not execute the agreement and file it under sub-section (3), he shall be deemed for the purposes of this section to have refused to execute it.

(6) If a raiyat refuses to execute an agreement tendered to him under this section, and the landlord thereupon institutes a suit to eject him, the Court shall determine what rent is fair and equitable for the holding.

(7) If the raiyat agrees to pay the rent so determined, he shall be entitled to remain in occupation of his holding at that rent for a term of five years from the date of the agreement,

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but on the expiration of that term shall be liable to ejectment under the conditions mentioned in the last foregoing section, unless he has acquired a right of occupancy.

(8) If the raiyat does not agree to pay the rent so determined, the Court shall pass a decree for ejectment.

(9) In determining what rent is fair and equitable, the Court shall have regard to the rents generally paid by raiyats for land of a similar description and with like advantages in the same village.

(10) A decree for ejectment passed under this section shall take effect from the end of the agricultural year in which it is passed.

For Govt. rules under sub-sections (2) and (4), see Appendix.

Sub-section (6):—The rule in this sub-section is according to the spirit of the decisions under the old Act. "The defendant"-observed the Court in a case, "has no right of occupancy; when the plaintiff instead of giving him notice to quit the land, chooses to retain him as a tenant, and asks the Court to compel the tenant to enter into an engagement to pay rent, the Court is bound to see that it does not enforce the payment of any rates but such as are just and equitable.—(Ram Mohan *v.* Madhoo Soodan, 11 W. R., 384). "It was contended," said Peacock, C. J., in delivering the judgment of the Court, "that the landlord may enhance the rent of a raiyat to any amount he pleases, and specify any grounds that he pleases for such enhancement; and that he is not bound to prove that any of such grounds exist, and that it is for the raiyat to prove that no such grounds exist. It appears to me that a landlord cannot enhance his rent, unless he states the grounds on which he seeks to enhance, and if those grounds are disputed, it will be for the Court to determine whether they exist, and whether they are such as to justify the enhancement."

Fair and equitable rent:—See sub-section (9) which follows and section 24 *ante* and notes. Where the tenant was found to have no right of occupancy, and the landlord sought to enhance his rent, amongst other grounds on the ground that the land was situated on the banks of a navigable river, and that a Government road had been opened in the neighbourhood, it was held that he was entitled to do so—(Pitambur *v.* Ramtanoo, 10 W. R., 122.)

Sub-section (9):—Sub-sec. (9), is not exhaustive, but is merely one of the methods by which a Court, acting under sub-sec. (6) of the same section, is intended to arrive at the determination of the question as to what is a fair and equitable rent. The fact that a plaintiff, suing a non-occupancy raiyat for enhancement of rent, is unable to comply with the provisions of sub-sec. (9), does not preclude the Court from having other evidence in support of his contention:—Nwab Sir Syed Hossein *v.* Hati Charan, 4 C. W. N., 321. I. L. R., 27 Cal., 476.

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Explanation of "admitted to occupation."

47. Where a raiyat has been in occupation of land and a lease is executed with a view to a continuance of his occupation, he is not to be deemed to be admitted to occupation by that lease for the purposes of this chapter, notwithstanding that the lease may purport to admit him to occupation.

Other incidents of a non-occupancy holding.

Right to sub-let:—See *ante* p. 191 and section 85 *post*, which treats of sub-letting and is wide enough to include a non-occupancy-raiyat, because the power to sub-let is given to the 'raiyat', but in the case of a non-occupancy-raiyat, whose status depends upon contract, the landlord may put in a condition of forfeiture upon sub-letting. And though s. 178 (3) (*e*) protects an occupancy-raiyat against a contract prohibiting sub-letting, it does not protect a non-occupancy-raiyat from the effect of such a contract; and if we read cl.(*e*) with sub-sections (*c*) and (*d*) of s. 178, it seems to have been the clear intention of the Legislature that the landlord can by exprees agreement prohibit sub-letting by a non-occupancy-raiyat. If the forfeiture be stipulated in the contract, breach of the contract may give a good cause of action to the landlord to proceed under s. 44 *ante*. But where sub-letting has not been expressly provided for in the contract, does a non-occupancy-raiyat by sub-letting render his holding unfit for the purposes of his tenancy s. 44 (*b*)? That is a question of fact, and will depend upon the circumstances attending the inception of the tenancy.

Inheritability:—See *ante* p. 188. Where there is a custom or usage, s. (178) (3) (*d*) will govern the case. Death of the non-occupancy-raiyat is no ground of determination of the tenancy; and possibly under the general principles of equity and good conscience, the heir of a non-occupancy-raiyat will have the benefit of the remainder of the term of a registered or a determined lease. In the case of a tenancy without a lease, the tenancy will be considered as continuing from year to year, and equity will not allow it to be inhertiable. A contrary view involves the risk of laying down that a non-occupancy holding is a permanent property, and will be in the hands of the heirs of the landholder, as long as they are available—a proposition which is absurd.

Right to transfer:—Where there is a custom, s. 178 (3) (*d*) will govern the case. Otherwise a non-occupancy raiyat may not transfer his holding. See p. 191 *ante*.

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CHAPTER VII.

UNDER-RAIYATS.

Limit of rent recoverable from under-raiyats.

48. The landlord of an under-raiyat holding at a money-rent shall not be entitled to recover rent exceeding the rent which he himself pays by more than the following percentage of the same, (namely) :—

(*a*) when the rent payable by the under-raiyat is payable under a registered lease or agreement—fifty per cent; and

(*b*) in any other case—twenty-five per cent.

Extended to Orissa, (Not., Sept. 10th, 1891).

Clause (a) :—The provisions of this clause are retrospective. Where an under-raiyat holds under a registered lease executed before the Bengal Tenancy Act came into force, the provisions of section 48, clause (*a*), operated as a bar to the raiyat recovering from his under-raiyat rent more than 50 per cent. in excess of the rent payable by him to his own landlord.—Ram Kumar Jugi *v.* Jafar Ali, [1898], I. L. R., 26 Cal., 199, note; Guru Das *v.* Nand Kishore [1898], I. L. R., 26 Cal. 199; Babaluddin Mohamed *v.* Dwarka Nath [1900], I. L. R., 28 Cal., 166. When the under raiyat pays in kind, the section is not applicable.

Restriction on ejectment of under raiyats.

49. An under-raiyat shall not be liable to be ejected by his landlord, except—

(*a*) on the expiration of the term of a written lease;

(*b*) when holding otherwise than under a written lease, at the end of the agricultural year next following the year in which a notice to quit is served upon him by his landlord.

Compare sections 66, 85, 89, 155 and 156, *post*.

Clause (a):—This clause declares that an under-raiyat holding under a written lease shall not be liable to be ejected except on the expiration of the term of that lease. But this does not affect the right of the raiyat-landlord to instiute a suit under s. 66 on the under raiyat's default of payment of rent. A suit for ejectment cannot be brought until after the liability to ejectment has arisen. But if a suit is brought before the expiry of the Bengali year in respect of the arrears of rent for that year, the raiyat landlord is not entitled to eject the under-raiyat tenant under the provisions of section 66.—Gurudas *v.* Nund Kishore, I. L. R., 26 Cal., 199.

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Clause (b):—Where the under-raiyat is "holding otherwise than under a written lease," he can be ejected only "at the end of the agricultural year next following the year in which a notice to quit is served upon him by his landlord.". An under-raiyat who has been let into land under a kabuliyat, but has been allowed to hold on for a number of years after the expiry of the period mentioned in the lease, comes withtin the provisions of s. 49, clause (*b*).—Rabiram *v.* Uma Kant, 2 C. W. N., 238. "Written lease" in cl (b) of this section means such a lease as is mentioned in cl (a) *i.e.*, a written lease defining the term of the tenancy.—Komaruddi *v.* Sreenath Chowdhry, 8 C.W. N., 136; Mahendra Nath Sepai *v.* Parbutty Chandra Das, 8 C.W.N., 136. "Written lease" also means a written lease for a fixed term of years. Idugazi Doctor *v.* Chandra Kali Sundrani 8 C. W. N., 139.

Holding over.

Written lease.

An under tenant, who is not an occupancy raiyat, cannot be ejected by the landlord without the notice prescribed by this section in order to take khas possession of the holding: Peary Mohan Mukherjee *v.* Badul Chandra Bagdi, I. L. R., 28 Cal., 205. *distinguished.*—Amirullah Mahomed *v.* Nazir Mahomed, I. L. R., 31 Cal., 932. See Babu Ram Roy *v.* Mohendra Nath Samanta 8 C. W. N., 454.

Notice to quit:—An under-raiyat does not in case a forfeiture of his tenancy by denying his landlord's title nor can he be ejected from his holding except after a notice to quit as prescribed by clause (*b*) of the present section,—Dhora Kairi *v.* Ram Jewan, I. L. R. 20 Cal. 101; Kapali *v.* Jaki Karikar, 6 C. W. N. 377. A suit to eject an under-raiyat under sec. 49, cl. (*b*) of the Bengal Tenancy Act can not be maintained without a notice to quit and the suit itself cannot be regarded as a sufficient notice. Where an under-raiyat was let into occupation under a kabuliyat for a year but held over for a number of years: *held*—That he was not holding under any written lease, and therefore under clause (*b*) of sec. 49 of the Bengal Tenancy Act, he was not liable to be ejected without a notice to quit, although the terms under which he was holding were the same in there under which he had been let in under a written lease:—Rabiram *v.* Uma Kanta, 2 C. W. N., 238. But where an under-raiyat holds under a written lease for an indefinite time the raiyat is not entitled to eject him under s. 49 (*b*); he can be ejected only for non-payment of rent:—Annada *v.* Rajendra, 6 C. W. N., 575; I. L. R., 29 Cal. 223. Where a notice to quit does not specify the date from which time specified in the notice is to run, such a notice is ambiguous and bad in law; the validity of such a notice may be questioned for the first time in the course of a suit in second appeal:—Gouri Sankar *v.* Naja Bratt, 1 C. W. N., cl. xxix. Sec. 49 of the Bengal Tenancy Act does not prescribe any period of notice or that the suit for ejectment shall not be brought until a certain term after the period of notice expires. The effect of the section seems to be that the landlord can serve a notice to quit at any time in the course of year but that he shall not eject the raiyat until the end of the year next following the the year in which the notice to quit is served, that is to say, an under-raiyat must under any circumstances get a full year expiring at the end of

Period of notice.

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the agricultural year from the time when the notice is served:—Naharulla *v.* Madan. 1 C. W. N., 133, followed in Dwarka Nath *v.* Rani Dassi, I. L. R., 28 Cal., 310, where it was held that it is not necessary that a notice under s. 49, cl. (*b*) should mention any particular period within which the under-raiyat is to quit the land. Where a notice to quit to an under-raiyat was served in Pous 1303 and he was required to quit in Bysak 1304, and the suit was not instituted till the 1st of Bysak 1305; *held*, that the tenant was liable to ejectment:—Mohendra *v.* Biswanath, 6 C. W. N., 183, I. L. R., 29 Cal., 231. But to determine an annual tenancy the notice should require the tenant to quit at the end of the year of the tenancy; so where a notice bearing the 26th of Jaistha 1304 B. S., was given calling upon the defendants to quit at the end of six months, *viz.*, on the last day of the month of Agrahayana of the same year and the suit was brought on the 16th Magh 1304; *held*, that the tenancy being an annual tenancy expiring at the end of the year the notice was bad and the suit was liable to be dismissed and that the decree given by the lower Appellate Court for khas possession at the end of 1306 was bad:—Hemanginee *v.* Srigovendo, 6 C. W. N., 69: see also Ramlal *v.* Dinanath, I. L. R., 23 Cal., 200; Hem Chunder *v.* Radha Pershad, 23 W. R., 440; Rajendra *v.* Bassider, I. L. R., 2 Cal., 146; Kishore Mohun *v.* Nund Kumar, I. L. R., 24 Cal., 720.

Annual tenancy.

As there is no special rule for the service of the notice to quit under clause (b), its service should apparently be effected in accordance with rule 3, Chap. I of the Government rules under the Tenancy Act, *i. e.*, in the manner provided in the Civil Procedure Code for the service of a summons. If the notice to quit has not been served in this manner, the suit for ejectment should be dismissed.—Taradas Malakar *v.* Ramdoyal Malakar, 2 C. W. N. A notice, therefore, sent by post in a registered cover and proved to have been delivered to the defendant, is not sufficient in law.—*Ibid*; Lala Makhanlal *v.* Lala Kuldip Narain, I. L. R., 27 Cal., 774. There is no rule, however, requiring that the notice should be served through the Court; what is really required is that it should be served in the same manner as is provided in the Code of Civil Procedure; and if that is done, the requirements of the law are complied with.—Lokenath *v.* Pitambur, 3 C. W. N., 215. An objection to the notice that it should have been made by proclamation and beat of drum, raised for the first time in second appeal, cannot be entertained.—*Ibid.* But a trifling error which was never objected to by the defendant on the ground that he was misled by the defect, would not vitiate the notice.—*Ibid.* In a case where four under-raiyats were sued under the provisions of s. 49 upon the ground that they had not been served with a notice to quit as required by clause (b), it appeared that a personal service had been effected on only one of them, it was held that Rule 3 of Chap. I of the Local Government Rules, dated the 21st December 1885, had not been complied with and that consequently the notice was bad in law.—Tamasha Bibi *v.* Mathuranath, 6 C. W. N., 67. This rule has since been changed by notification, dated 8th January 1900. Where a notice to an under-raiyat, served in Pous 1303, called upon him to quit

Service of notice.

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in Bysakh 1304, but the suit was not actually instituted until the first of Bysakh 1305, it was held that it was a good notice, and that the under-raiyat was liable to ejectment.—Mahendranath *v.* Bisvanath, I. L. R., 29 Cal. 231 ; 6 C. W. N., 183. It was also held that the law does not apparently require that the notice should be actually signed by the landlord. It is sufficient if the notice is at the instance of the landlord calling upon the under-raiyat to quit the land : and it is quite immaterial whether the notice is actually given by the landlord himself or at his instance, provided that the notice signifies to the under-raiyat that the landlord has called upon him to quit the land.—*Ibid.* Where a raiyat surrenders his holding, the landlord is entitled to re-enter by ejecting the under-raiyat if he is not protected by sec. 85 or 86, cl. (6). In such a case no notice to quit is necessary.—Nilkanta *v.* Ghattoo, 4 C. W. N., 667. A sub-lease differs from an assignment of lease in that it creates no privity of contract between the sub-tenant and the landlord ; the landlord has to deal with his lessee and not with the sub-tenants of the latter. A landlord putting an end by proper notice to the tenancy of his tenant thereby determines the estate of the under-tenants of the latter.—(Timmappa *v.* Rama Venkanna, I. L. R., 21 Bom., 311).

When notice not necessary

Other incidents of an under-raiyat's tenancy :—For right of occupancy, see s. 20, and notes at p.p. The Bengal Tenancy Act contemplates the possibility of the acquisition of occupancy rights by under-raiyats.—See s. 113, and s. 183, illustration 2, *post*.

The rights of an under-raiyat are not heritable. His right to transfer depends upon custom, see s. 83. So under the old law—(Banamali *v.* Kailas Chunder, I.L.R., 4 Cal., 135). An under raiyat may sub-let in his turn, for though sec. 85 apparently contemplates sub-letting by raiyats, yet in sec. 4 (3) under raiyats are defined as "tenants holding whether immediately or *mediately* under raiyats." He can protect himself against the extinction of his rights in the land in consequence of a surrender of the holding by his raiyat landlord only by means of a registered instrument [sec. 86 (6)]. The grant of a *mukarari* lease may convert tenants, who were originally under-raiyats holding at fixed rates—Baburam Medda *v.* Umesh Chandra Parui, 2 C. W. N., ccxxxiv).

Right to sub-let.

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CHAPTER VIII.

GENERAL PROVISIONS AS TO RENT.

These provisions are meant to apply to all tenants and have therefore been characterized as' general.' They include the following sub-heads :—(1) *Rules and presumptions as to amount of rent*; (2) *Alteration of rent or alteration of area*; (3) *Payment of rent*; (4) *Receipts and accounts*; (5) *Deposit of rent*; (6) *Arrears of rent*; (7) *Produce rents*; (8) *Liability of rent on change of landlord, or after transfer of tenure or holding*; and (9) *Illegal cesses, &c.*

Rules and presumptions as to amount of rent.

50. (1) Where a tenure-holder or raiyat and his predecessors in interest have held at a rent or rate of rent which has not been changed from the time of the Permanent Settlement, the rent or rate of rent shall not be liable to be increased except on the ground of an alteration in the area of the tenure or holding.

Rules and presumption as to fixity of rent.

(2) If it is proved in any suit or other proceeding under this Act that either a tenure-holder or raiyat and his predecessors in interest have held at a rent or rate of rent which has not been changed during the twenty years immediately before the institution of the suit or proceeding, it shall be presumed, until the contrary is shown, that they have held at that rent or rate of rent from the time of the Permanent Settlement.

Provided that if it is required by or under any enactment that in any local area tenancies, or any classes of tenancies, at fixed rents or rates of rent shall be registered as such on or before a date specified by or under the enactment, the foregoing presumption shall not after that date apply to any tenancy or, as the case may be, to any tenancy of that class in that local area unless the tenancy has been so registered.

(3) The operation of this section, so far as it relates to land held by a raiyat, shall not be affected by the fact of the land having been separated from other land which formed with it a single holding, or amalgamated with other land into one holding.

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(4) Nothing in this section shall apply to a tenure held for a term of years or determinable at the will of the landlord.

This section has compressed ss. 4, 16 and 17 of Act VIII of 1869, B. C. and corresponding ss. 4, 15 and 16 of Act X of 1859.

Old law :—Section 4 provided: Raiyats who, in any provinces to which this Act may apply, hold land at fixed rates of rent, which shall not have been changed from the time of the Permanent Settlement of such province, are entitled to receive pottahs at those rates." So section 16 of Act VIII of 1869 B.C. (section 15 of Act X of 1859) provided: "No dependent talukdar or other person possessing a permanent transferable interest in land intermediate between the proprietor of an estate and the raiyat, who, in any province to which the provisions of this Act may apply, holds his taluk or tenure (otherwise than under a terminable lease) at a fixed rent which has not been changed from the time of the Permanent Settlement, shall be liable to any enhancement of such rent, anything in section 51, Regulation VIII of 1793, or in any other law, to the contrary notwithstanding."

Tenure-holder or raiyát and his predecessors in interest:—The word "predecessors" seems to imply that in case of transfers, the purchasing tenant may add to his tenure the time of his predecessor, the outgoing tenant. Under section 4 of Act VIII of 1869 B. C., it has been held that the mode in which the tenant acquired the land did not affect the application of the rule—(Tirthanund Thakur *v.* Herdu Jha, I. L, R., 9 Cal., 252; Ram Nath *v.* Watson, *per* Peacock, C. J., 1 R. J. P. J., 54; Raj Kishore *v.* Hureehur, 10 W.R., 117; Kashi Nath *v.* Bama Sundari, 10 W.R., 419.

Rent which has not been changed:—The change of Sicca rupees into Company's does not alter the fixity of the rate.—(Kalichurn *v.* Shoshee Dasee, 1 W. R., 248; Ram Kumar *v.* Raghu Nath, 1 W. R., 352; (3 R. J. P. J., 353); Khattyani Debia *v.* Soondari Debia, 2 W. R., (Act X), 60 (4 R. J. P. J., 154); the Tarasoondari *v.* Sibesvar, 6 W. R., Act X, 51; Watson & Co. *v.* Nundolal Sircar, 12 W. R., 42 ; A Sicca rupee exceeds the Company's rupee by one anna 5 cowries and 1 kranti. The variation of a few rupees between a raiyat's admitted *jumma* and the *jumma* of his *dowl* is not such a variation as to destroy the right of a fixed *jumma*.—(Huro Nath *v.* Ameer Biswas. 1 W. R., 230.) A nominal reduction or a trifling difference in the *jumma* is not a variation that deprives the raiyat of the benefit of the presumption under this section (Ramruttun *v.* Chundramukhi, 2 W. R., Act X, 74.) The difference of 1 rupee in a *jumma* of 60 rupees was held to be not sufficient to destroy the presumption—(Anandalal *v.* Hills, 4 W. R., Act X, 33). A variation of one anna does not destroy the uniformity required by this section:—Munsoor Ali *v.* Bunno Sing, 7 W. R., 282. A trifling difference in the *jumma* does not necessarily affect the fact of an uniform payment.—Elahi Bux *v.* Rupan Telee, 7 W. R., 184. A variation in the rate of rent which does not affect the integrity of the *jumma* does not rebut the presumption of a holding at a fixed rent from the Permanent Settlement.—Gopalchunder *v.*

Difference of currency is not a variation.

Trifling variation in the jumma.

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Mathurmohun, 3 W. R., Act X, 132. Where a tenant showed uniform payment of rent for nineteen years, and a slight difference (two or three annas) in the rate for a long period prior thereto, he was allowed the benefit of the presumption under Act VIII of 1869 (B. C.), s. 4.—(R. Watson & Co. *v.* Nundolal Sirkar, 21 W. R., 420.) Abwabs are not rents, and therefore the collection of abwabs in addition to rent does not constitute a variation which would affect the presumption of this section.—Samiruddin *v.* Haro Nath, 2 W. R., Act X, 93; 4 R. J. P. J., 308. An abatement of rent by order of a Civil Court in consequence of a diluvion does not prove alteration of the rate of rent, or affect raiyat's claim to the benefit of the presumption arising under this section.—(Reazoonnessa *v.* Tookan Jha, 10 W. R., 246) Where an abtement of rent is allowed in a lump sum upon a lump *jumma* on account of lands rendered unculturable by the overflow of a river, the abatement is not such a variation of the rate of rent as to debar the raiyat from the benefit of the presumption under this section—Radha Gobindo *v.* Kiamatulla, 21 W. R., 401. When a tenant holding land which had paid an uniform rent since the Permanent Settlement, relinguished a portion of his holding, and received a fresh pottah from his landlord, in which a deduction was made for the relinquished land, it was held that the fixity of rent for the remaining portion was not affected by the arrangement. The pottah was merely the confirmation of the tenancy already existing.—(Kenaram *v.* Ramkoomar, 2 W. R., (Act X), 17.) So a diminution in the *jumma* caused by the alienation of a portion of his jote does not deprive a raiyat of the benefit of the presumption of s. 4. *Ib.* The sale of a portion of a tenure involving a distribution of the rent over two parts does not amount to a change of rent within the meaning of s. 4 of Act VIII of 1869 (B. C.), so as to deprive the defendant of the benefit of the presumption under that section.—(Soodha Mukhi *v.* Ramgati, 20 W. R., 419.) But the purchaser of several holdings of cultivating raiyats cannot, by uniting them and paying one rent for the whole, change their character without the consent of the landlord.—(Moula Buksh *v.* Jadoonath, 21 W. R., 267.)

Abwabs.

Abatement, surrender or alienation does not affect the presumption.

A mere alteration in the rate of the rent will not prove variation, unless the tenant submitted to or paid the enhanced rent.—Gopal Mundle *v.* Nobo Kishen 5 W. R., Act X, 83. But, on the other hand, it is not uniformity in the amount actually paid that is required to raise the presumption, but only the uniformity in the rate agreed upon, either express or implied, between the parties to be paid.—(W. Moran *v.* Anand Chander, 6 W. R., Act X, 35.) *Ex parte* summary decrees are not satisfactory proof that a variation has taken place in the amount of the rent paid so as fo destroy the presumption under s. 4, Act X.—(Kaleekanto *v.* Bibi Ashrufunnesa, 2 W. R., 326; Joykishore *v.* Gopallal, 6 W. R., Act X, 28.) A putnidar is protected from an enhancement under s. 15, Act X, notwithstanding a decree passed before that Act, by which the zeminder was declared entitled to enhance, the latter having omitted to take any effectual steps before the Act to vary the rent since the Decennial Settement.—(Gobind Chander *v.* Haronath 5 W. R.,

Mere alteration in the rate of rent, or an ex parte decree does not destroy the presumption.

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Act X, 10; *contra*, see also Kalee Chander *v.* Ruttun Gopal, 11 W. R., 571.) In a suit for enhanced rent brought by a landlord under Act X, the benefit of the presumption under s. 4 arising from twenty years' uniform payment of rent cannot avail the raiyat against a former decree of a competent Court declaring his holding liable to enhancement.—(Rakhal Dass *v.* Shaik Golam, 2 W. R., Act X, 69.) This decision was adopted by the Privy Council as to the presumption under ss. 15 and 16 referring to under-tenants or talukdars.—(Nufferchunder *v.* Jonathan Poulson, 19 W.R., 175 P. C.; 12 B. L. R., 153; and Hurro Nath *v.* Gobind Chander, 23 W. R., 352; P. C., 15 B.L. R., 120; L. R., 2 I. A., 193.) So a decree of the late Sudder Court fixing the enhanced *jumma* for a certain jote, passed before the promulgation of Act X, was held not to have become ineffectual by the fact of on rents having been recovered under it.—(Doorga Churan *v.* Doya Moyee, 20 W. R., 243.) And the acceptance of old rent for year subsequent to decree the date of enhancing the rent, is no waiver to plaintiff's claim to the higher rate decreed.—(Mr. Lauder *v.* Benode Lall, 6 W. R., Act X, 37. See also Woodoy Narain *v.* Tarini Churan, 11 W.R., 496). On the other hand, where a tenant's title to mokurari tenure is established under a judicial decree of 1792, he having been at some time forced to pay a larger rent than was due, will not render him liable to enhanced rent forever.—(Goluk Chander *v.* Sandes, 5 W. R., Act X, 32.) In a suit by the present defendant against the present plaintiff for an enhancement of rent, the Court of first instance and the High Court gave plaintiff's decrees for enhanced rent. The Privy Council in the year 1873 reversed those decrees, and held that the rent could not be enhanced. Before the date of the Privy Council judgment, the present defendant obtained several other judgments for enhanced rent against the present plaintiff. No application was made by him for review of those judgments, but in 1875 he brought this suit to recover the difference between the amount of enhanced rent recovered, and the fixed rent which he was bound to pay. *Held* by Macpherson, Makby and Ainslie, JJ., that the decrees for enhanced rent were superseded, as the former class of decrees are *ipso facto* superseded so far as the controlling decrees is nullified, and that such a suit as the present one would lie.—(Joges Chunder *v.* Kali Churan, I. L. R., 3 Cal., 30, F. B., Mahomed Elahee Buksh *v.* Kalee Mohan, I. L. R., 5 Cal., 589; Shama Prosad *v.* Hurro Prosad, 10 Moo. I. A., 230; 3 W. R., P. C., 11.) Plaintiff sued defendant in 1873 for arrears of rent at a certain rate. Defendant pleaded that the land had been held by him at an uniform rent for more than twenty years, and this contention was supported by the Court. Plaintiff then gave the defendant notice of enhancement and sued to recover rent for two years at the rate stated by defendant and for one year at an increased rate. To this suit defendant raised substantially the same defence: *Held* that the decision in the previous suit was not a bar to the present suit, there being two questions for consideration *viz.*, whether there had been an uniform payment of rent for twenty years, and, if so, whether the presumption, which the law directs to be drawn from such uniform payment, had been rebutted by the plaintiff; neither of which questions had been concluded by the previous decision.—(Gopee Mohan *v.* Hills, I. L. R., 3 Cal., 789.) The question in this case

Res judicata,—Effect of decrees.

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depended upon the pleadings in the former suit. Markby, J., observed: "One of these questions (the 2nd) was not, and could not be, gone into in the previous suit. It has nothing whatever to do with the former case, where the landlord received different rates of rent at some earlier period. No doubt the Court in the former case did express an opinion that for twenty years rent had been paid at an uniform rate; but even that was not a question in issue in the former suit, and in such a manner as to make the decision in the former suit for enhancement of the rent of a share in a dependent taluk, the zemindari under which the taluk was held was partitioned under a butwara among the zemindars. A ten-anna share was allotted to one (the present plaintiff) a four-anna share to another, and a two-anna share to a third. The talukdars continued to hold the entire property, and paid the rent apportioned by law severally to each of the parties entitled. In 1861 the owner of the two-anna share obtained a decree against the talukdars for enhancement of the rent of his share. In the present suit against the same talukdars, the defendants contended that the rent of their taluk had not been changed for a period of more than twenty years before suit. It was held that the taluk, which was intended by s. 17 of the Rent Act, was the original taluk, and that if the defendants could show that the rent of that taluk had remained unchanged, either in its original entirety or apportioned as it had been under the butwara, they would be entitled to the benefit of the section; but that the decree in the suit of 1861 had the effect of enhancing the rent payable for the whole taluk, and that the plaintiff could avail herself of that decree, though she was not a party to it.—(Sarut Sundari *v.* Anunda Mohan, I. L. R., Cal., 273.) N brought a suit against P for enhancement of rent. P's defence was (1) that no notice of enhancement had been given: (2) that the rent was not enhanceable as he and his predecessors in title had held it at a fixed rent from the date of the Permanent Settlement. The suit was dismissed on the ground that no notice had been given; but the Munsiff stated in his judgment that he considered the rent enhanceable, because he did not believe in the genuineness of the documentary evidence produced by P. The decree merely ordered that the suit should be dismissed, the portion of the judgment as to the enhanceability of the rent not being embodied in the decree. P therefore had no right of appeal against that portion of the judgment. In a subsequent suit by N against P for enhancement of rent of the same tenure, it was held that P was precluded by the decision in the former suit, from denying that the rent of the tenure was enhanceable, although the decision on that point was not embodied in the decree.—(Niamut Khan *v.* Phadu Buldia, I. L. R., 6 Cal., 319, F. B.) In Nundlal *v.* Bedhoomukhy, I. L. R., 13 Cal., 17, the correctness of this decision was doubted and relying upon a portion of the judgment of Run Bahadur *v.* Lucho Koer, I. L. R., P. C., 11 Cal., 301, it was maintained that where a former suit between the same parties in respect of the same subject-matter has been dismissed on a preliminary point, a finding in that suit as to the merits in the plaintiff's favour will not bar the defendant from putting forward the same defence on the merits in a subsequent suit by the same plaintiff against the same defendant.

In deciding cases under this section, it is only necessary to consider whether the raiyat has held at a fixed rent and from the Permanent Settlement. For

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definition of "Permanent Settlement," see sub-s. 12 of s. 3, *ante*, "The right of exemption from enhancement is founded upon the simple fact of the land having been held at a fixed rate of rent from the time of the Permanent Settlement. When it is proved that the land has been so held, no further question arises as to whether it was so held under an *istemrari* or *mokurari* pottah, or whether the person claiming the right to enhance is an auction-purchaser or not. Sections 3 and 4 of Act X make no mention of the nature of the pottah under which the land has been held, or of the right under which a fixed rent has been paid without alteration, but exempt from assessment lands which have been held at fixed rents from the time of the Permanent Settlement. The presumption required to be made is not that the land has been held by the raiyat and his ancestors, or by him and the persons who had power to alienate it to him, but simply that it has been held at a fixed rent."—(Ram Nath *v.* Watson, 1 Board's Rep., 169, *per* Peacock, C. J.)

If the land has been held at a fixed rent from the Permanent Settlement the nature of the holding need not be considered.

When a raiyat has held at a fixed rent from the time of the Permanent Settlement, he is entitled to demand a pottah at the fixed rate at which he has held, and his rent can be enhanced even by an auction-purchaser at a sale for arrears of revenue.—(Saduk *v.* Mahamaya, 6 W. R., Act X, 16 ; 1 Ind. Jur., 77.) The raiyat is equally protected, whether the sale of the estate was made under the former sale law, Act I of 1845, or the existing law, Act XI of 1859. Under Act I of 1845, s. 26, a tenure was only secure from enhancement when it had been held at a "fixed rent more than twelve years before the Permanent Settlement ;" but this has been modified by s. 1 of Act X of 1859, which says, that such parts of s. 26, Act I of 1845, as relate to the enhancement of rents and ejectment of tenants by the purchaser of an estate sold for arrears of Govt. revenue, are declared subject to certain modifications, one of which is that contained in s. 3 *viz.*, that a raiyat who has held at a fixed rate of rent, which has not been changed from the time of the Permanent Settlement, is entitled to receive a pottah at that rate. —(Hurryhur *v.* Puddo Lochon, 7 W. R., 176, F. B.) Auction-purchasers at a revenue sale where declared entitled, after notice duly given, to enhance the rents of all under-tenures and to eject all under-tenants with the following exceptions, and cl. 2 of s. 26 Act I of 1845, and Act XII of 1841, gave the first and second exceptions, *viz*, (1) Istemrari or mokurari tenures held at a fixed rent more than twelve years before the Permanent Settlement ; (2) tenures existing at the time of the Decennial Settlement, but not proved to be liable to a increase of assessment on the grounds stated in s, 51 Reg. VIII of 1793. Clause 2 of s, 37 of Act XIof 1859 made, however, exceptions for (1) Istemrari or mokurari tenures held at a fixed rent from the time of the Permanent Settlement ; (2) Tenures existing at the time of settlement, which have not been held at a fixed rent, provided always, that the rents of such tenures shall be liable to enhancement under any law for the time being in force for the enhancement of the rent of such tenures. It will thus appear that, under cl. 2 of ss. 27 and 26 respectively of Acts XII of 1841 and I of 1845, the tenures, if shown to be in existence at the time of the Decennial Settlement, were protected from enhancement, unless the auction-

Protection against auction-purchasers.

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purchaser could prove their liability thereto; under the corresponding clause in Act XI of 1859, the tenant is protected from ejectment but is liable to enhancement unless he can prove that he held at a fixed rent for the time of the Permanent Settlement. The burden of proof in this latter case is, however, considerably lengthened by the twenty years' presumption of ss. 4 and 16 of Act X of 1859 (ss. 4 and 17 of Act VIII of 1869, B. C.), corresponding to the present section. A tenant who has held land since the Permanent Settlement, but at a varying rate, acquires no right under this section; his position is in no respect superior to an ordinary raiyat with a right of occupancy; and consequently he is only entitled to pottah at fair and equitable rates. —(Dinabundhu *v.* Ramdhon, 9 W. R., 522.)

Except on the ground of an alteration in the area of the holding or tenure:—The use of the word "alteration" is not very happy. Alteration implies a change by addition or subtraction. If a tenant holds ostensibly a certain quantity of land, but it is found on measurement that he holds more than what he professes to hold, can we say that there has been an alteration in the area? For notes under this head, see s. 52 of the Act.

Excess lands are liable to enhancement.

Sub-section 2:—Section 4 of Act VIII of 1869 ran as follows: "Whenever in any suit under this Act it shall be proved that the rent at which land is held by a raiyat in any such province has not been changed for a period of twenty years before the commencement of the suit, it shall be presumed that the land has been held at that rent from the time of the Permanent Settlement, unless the contrary be shown, or unless it be proved that such rent was fixed at some later period." And s. 17 of Act VIII of 1869, B. C. (s. 16 of Act X of 1859) provided: "Whenever in any suit under this Act, it shall be proved that the rent at which a taluk or other tenure is held in the said provinces has not been changed for a period of twenty years before the commencement of the suit, it shall be presumed that such taluk or tenure has been held at that rent from the time of the Permanent Settlement, unless the contrary be shown, or it be proved that such rent was fixed at some later period."

The old law.

This sub-section should be read with s. 115 which provides that when the particulars mentioned in s. 102, cl. (b) have been recorded under Chap. X, the presumption under this sub-section shall not thereafter apply to that tenancy.—See note to that section and the decision in the case of Secretary of State *v.* Kazimuddin, I. L. R., 26 Cal., 617. See also s. 191, *post.*

Proviso to sub-section (2):—This proviso was introduced with a view to the introduction into Council of a Bill for the registration of the tenancies referred to; but the Bill, though introduced into Council, was subsequently abandoned (Proceedings of the Bengal Council, Nov. 27th, 1886, p. 102).

If it is proved that, &c:—In a suit for enhancement there must be legal evidence or *proof* of twenty years' uniform rent before defendant can obtain the benefit of the presumption under s. 4, Act X of 1859.—(Raj Narain *v.* Atkins, 1 W. R., 45; 3 R. J. P. J., 161. See also 3 W. R., Act X, 148; Ram Kishore *v.* Chand Mundle, 5 W. R., Act X, 84.)

Proof necessary to establish the presumption.

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It would not be generally sufficient for the raiyat to swear that he has paid rent at a uniform rate for more than twenty years without proving such payments by *dakhilas* or other good independent evidence.—(Huro Chunder *v* Mohesh Chundra, 5 W. R., Act X, 89; Kalee Koomaree *v*. Shumboo Chunder, 6 W. R., Act X, 23; Prem Shahoo *v*. Sheik Nyamat Ali, *ib*., Act X, 89; Ananda Sundari *v*. Doorga Moni, *ib*., Act X, 91.) A raiyat is bound to give strict proof of a uniform payment of rent for twenty years. That is a matter which should not be decided in his favour on mere inference.—(Sham Lal *v*. Boistub Churn 7 W.R., 407.) The evidence must go the distance of twenty years at least.—(Bungo Chandra *v*. Ram Kanye, 10 W. R., 256.) The presumption cannot be established by imperfect and unproved evidence.—(Sree Nath *v*. Poglian, 17 W. R,, 374.) On the other hand, it has been held that a raiyat is not bound to file *dakhilas* in order to establish the presumption allowed by Act X of 1859, s. 4, if he can establish it by other good independent evidence.—(Radha Gobind *v*. Shama Sundari, 21 W. R., 403; Elahee Bux *v*. Rupan Tilee, 7 W. R., 284; Gobinda Kurmokar *v*. Kumud Nath, 3 W. R., Act X, 148.) The sworn declaration of the raiyat that the rent had not varied for more than twenty years corroborated by the records of the Collectorate which showed that the rent had been the same as it had been more than thirty years ago, was sufficient to warrant the presumption.—(Raj Doorlub *v*. Moheseur Bhutt, 10 W. R., 364) A uniform payment may be proved by evidence very much short of the production of receipts for each and every year during such period.—(Komal Lochan *v*. Zamiruddin, 7 W. R., 417.) Nor need he prove receipts for twenty consecutive years before the date of suit, if he happens to have lost the *dakhilas* for one or two years.—Katyanee Debi, *v*. Sundari Debi, 2 W. R., Act X, 60; 4 R. J. P. J., 154); more especially where the landlord refuses to take rent a few years before suit.—(Gyaram Dutt *v*. Gooroo Churan, 2 W. R., Act X, 59.) As to proof of uniform rent for twenty years the decisions all tend to show that it is not necessary to prove for each separate year of the twenty, provided that the receipts extend over that period.—(Hurro Nath *v*. Chitra Moni, 3 W. R., Act X, 122; so 1 W. R., 280; 3 R. J. P. J., 135.) But proof of uniform payment must be shown, if not for every year in twenty years, at least for the greater portion of that period, and for years in the earlier as well as in the later portion of the same.—(Surno Moyi *v*. Baboo Khan, 9 W. R., 270.) The most recent explanation on this point is thus given by Phear, J.: "We will add that the Judge ought not to presume a uniform rent for twenty years preceding suit upon evidence which only touched a portion of that period. For instance, suppose the evidence to satisfy him that the rent had been uniform for eighteen years before suit, he would be wrong in presuming from that alone that it must have been uniform for two more also, or in other words, for twenty years on the whole. On the other hand, to support a finding of uniformity for any given number of years, it is not necessary that there should be evidence bearing directly upon *every* year of that number. It is sufficient if the whole space of that time is included between limits upon which the evidence bears, provided that the evidence is such as to lead to the belief that the rent was uniform through out the intervening

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period."—(Foschola *v.* Hurro Chunder, 8 W. R., 284; Rash Behari *v.* Ram Kumar, 22 W. R., 487.) If the evidence in a case shows that, during the period for which receipts are not produced, the raiyat was paying at a different rate of rent, that evidence must be considered with the receipts that are produced.—(Gobinda Chunder *v.* Romani Dasi, 6 W. R., Act X, 42.) "The varying amounts of rent paid by the defendant in each year are not inconsistent with the uniformity in the amount of payment required by law to warrant the presumption. It is not uniformity in the amount actually paid that is required to raise the presumption but only uniformity in the rate agreed upon."—(Moran & Co. *v.* Anunda Chundra, 6 W. R., Act X, 35.) "It is quite possible that a raiyat may not have paid his rent regularly, in which case there would be a variarion in the amonnt of rent as shown by the receipts. If this kind of variation were to be the test, no raiyat would be safe, and the object of the law would be frustrated.—Sham Charan *v.* Dwarka Nath, 19 W. R., 100.) On the other hand, the amount of rent paid is not conclusive evidence of the amount of rent at which land is held but may be rebutted by showing that the rent is greater or less. (Ananda Moyi *v.* Ranee Surnomayi. 6 W. R., Act X, 83.)

Evidence required to prove receipts.

As a general rule, *dakhilas* should be attested or proved by oral evidence in the same manner as all other documentary evidence. The tenant cannot be expected in every case to summon all the gomastas of his zemindari for the past 20 or 30 years to attest his *dakhilas*. He may attest the *dakhilas* himself which were given to him personally —(Rajessuri *v.* Srinath, 4 W. R., Act X, 42; Dumaine *v.* Oottum, 13 W. R., 463; compare 5 W. R., Act X, 11, 53; 6 W. R., Act X, 83; 7 W. R., 15, 91, 105, 335; 8 W. R., 517; 10 W. R., 107, 490; 11 W. R., 105, 170; 17 W. R., 346) If a raiyat produces *dakhilas* and swears that he received them from the landowner or his agent, or gives other *primâ facie* evidence of their genuineness, and the landlord or his agent does not come forward and deny them or give evidence to show that they are not genuine, they may be taken as *primâ facie* evidence against him, if the evidence of the raiyat is believed. But this genuineness is not to be presumed merely because they are not disputed by the landlord. There must be some *primâ facie* evidence given to show their genuineness.—(Kritibash *v.* Ramdhun, 7 W. R., F. B., 526; 2 Ind. Jur., 197; Ramjodu *v.* Sukhie Narain, 8 W. R., 488; Gunganarain *v.* Saroda Mohan, 12 W. R., 30; Raj Rahomed *v.* Banoo Lashma, 12 W. R., 34; Madhub Chandra *v.* Raja Promothonath, 20 W. R., 264; compare 9 W. R., 147, 241; 14 W. R., 211; 20 W. R., 264.) *Dakhilas* unattested or attested only by the evidence of a manager or ammooktear of the defendant, are no legal evidence of uniform payment of rent.—(Reeazoonnisa *v.* Bookoo Chowdrain, 12 W. R., 267; see also 12 W. R., 350.)

Value of jumma-wasil-baki and other zemindari papers as evidence.

The value to be attached to jumma-wasil-baki and canungoe papers as proof on the part of the plaintiff in rebutting the presumption of a uniform rent was discussed by Norman, J., as follows; "A jumma-wasil-baki might be admissible under s. 43, Act II of 1855, as a book regularly kept in the way of business, but as such

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it would be corroborative and not independent proof of the facts stated therein: very possibly the paper may be made evidence. The writer of it may be produced. Refreshing his memory from the paper (see s. 45) he might be able to state what rent the defendant paid in the year in question; and then to corroborate his testimony, the paper may be put in under s. 43. If it is proved that the writer is dead and cannot be found, the document may be put in as an entry made in the ordinary course of business under s. 39, Act II of 1855. As to the canungoe papers, it is not stated that the state was held *khas* or under attachment in 1227; and if not, it is probable that the entries in the canungoe paper are not evidence against the defendant. If they simply give the rate of rent, they will probably have been made from mere hearsay in the first instance.—(Kheromoni Dasi *v.* Bijoygobind, 7 W. R., 533.) Jumma-wasil-baki ought not to be regarded as anything else than "books proved to have been regularly kept in the course of business," and by s. 43, Act II of 1855, they are "admissible as *corroborative*, but not as *independent* proof of the facts therein stated." They are consequently insufficient by themselves and without independent proof to rebut the presumption which arises under s.4, Act X of 1859, in favour of the defendant who has been found to hold lands at a uniform payment of rent for more than 20 years. —(Ramlal *v.* Tara Soondari, 8 W. R., 280; Sheik Newazi *v.* Mr. L. Lloyd, *ib.*, 464; Bejoy Gobinda *v.* Bhekoo, 10 W. R., 291; Mohimchundra *v.* Poorno Chundra, 11 W. R., 165) A jumma-wasil-baki paper is a private memorandum made for the zeminder's own use, and that of his servants, and must therefore be looked on with great suspicion. It should be attested and proved by the best evidence *i. e.*, of the writer himself.—(Adait Chaitaman *v.* Jugalchundra, 5 W. R., 242; compare s. 67 of Act I of 1872.) Hence where the raiyat proved a uniform payment for 20 years, it was held that the presumption was not rebutted by the omission of all mention of the holding in certain jumma-wasil-baki papers produced from the office of the canungoe and dated 1229.—(Ram Lochan *v.* Bamasundari, 6 W. R., Act X, 95.) Similarly jummabundi papers, like books of account can only be used as a corroborative evidence. —(Chamarnee Bibi *v.* Aenulla Sirdar, 9 W. R., 451; Gujjo Koer *v.* Syud Aulay Ahmed, 14 W. R., 474.) The evidence of the patwari as to previous collections, corroborated by the jummabundi papers of three years, is conclusive in a suit of rent. —(Dhanukdhari *v.* Mr. George Toomy, 20 W. R., 142.) The jummabundi papers are, however, valueless without the evidence of the patwari.—(Pundit Bhugawan Dutt *v.* Sheomungal, 22 W. R., 256.) Section 34 of Act I of 1872 has, however, altered the law as laid down by s. 43 of Act II of 1855, and jumma-wasil-baki papers are independent evidence in a suit for enhancement of rent to rebut a presumption arising from unifrom paymet for 20 years.—(Vilaet Khan *v.* Rashbehari, 22 W. R., 549.) "Now it would appar," observed in this case, Markby, J., "that prior to the late Evidence Act, these papers would not have been admissible to prove that fact unless some other evidence tending to establish the same fact had also been given. This was so held in a case reported in the 8 W. R., p. 280. The language of the Statute that was then in force differs, however, very materially from that of the present Act. By Act II of 1885, s. 48, documents of this kind were declared to be only admissible as corroborative, but

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not as independent proofs of the facts stated therein; that language has not been adopted in the present Act. The only limitation in s. 34 is that statements contained in documents of this kind shall not alone be sufficient evidence to charge any one with liability. It appears to me that this change of expression has made a substantial alteration in the law, and I do not consider that it can be said that these documents have been used alone in order to charge the defendant in this case with liability that has been imposed upon him. He is charged with the rent of the land he occupies by reason of its occupation by him, that rent being considered to be a fair and equitable rent for the land occupied; and what these documents have been used for is not to charge him with liability but to answer the claim which he set up to exemption from what would be the ordinary liability of a tenant." So jumma-wasil-baki papers are produced at the citation of the raiyat himself, they are not merely corroborative but good and sufficient evidence as against the latter in rebutting the presumption under this section.—(Shib Persad *v.* Promotho Nath, 10 W. R., 193.) But zemindar's papers filed and attested by gomastas are not conclusive proof of variation, unless it can be shown, not merely that the jumma-wasil-baki and similar papers show a varying rate, but that the raiyat has *paid* at a varying rate.—(Gopal Mundle *v.* Nobokishen, 5 W. R, Act X, 83.) Thus it has been held that jumma-wasil-baki papers are not admissible as independent evidence of the amount of rent mentioned therein; but it is perfectly right that a person who has prepared such jumma-wasil-baki papers on receiving payment of the rents, should refresh his memory from such papers when giving evidence as to the amount of rent payable.—(Akhil Chandra *v.* Naya, I. L. R., 10 Cal., 248.) A jummabundi prepared by a Deputy Collector while engaged in the settlement of land under Reg. VII of 1822, is a public document within the meaning of s. 74 of the Evidence Act, and it is not necessary to show that at the time when such document was prepared, a raiyat affected by its provisions was a consenting party to the terms therein specified.—(Tara Patra *v.* Abinash Chunder Dutt, I. L. R., 4 Cal., 79.)

During 20 years, &c:—A raiyat is bound to give strict proof of a uniform payment of rent for twenty years immediately preceding the commencement of twenty years' suit.—(Rajnarain *v.* Atkins, 1 W. R., 45; Musst. Mahmeda Bibi *v.* Haradhun, 5 W. R., Act X, 12.) The meaning of this section is that where, at the time of the commencement of the suit, land is held by a raiyat, and has been held by him, or by some person through whom he claims, at the same rent for a period of twenty years next before the commencement of the suit, the presumption specified in the section shall be made. In other words, there must have been a holding for twenty years next before the commencement of the suit at a rent which has not been changed during that period.—(Luteefunnisa Bibi *v.* Poolin Behari, 1 Hay's Rep., 242.) But the proof of uniform payment of rent up to the date of suit is not absolutely necessary to entitle a raiyat to the benefit of the the presumption in a case where the landlord refuses to take rent for a few years before suit.—(Gyaram *v.* Gooroochurn, 2 W. R., Act X, 59.) In cases of saleable tenures, the period of possession by the raiyat's vendor is included in the twenty years mentioned in this section.—(Kaza Newaz *v.* Nubokishore, 5 W.

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R., Act X, 53.) In a suit for enhanced rent, the presumption from uniform payment of rent for twenty years was held not rebutted by the mere fact that the defendant had acquired the tenure from another person originally in 1226.—(Sanji Lall Ramnarain *v.* Nudea Panda, 22 W. R., 475.) Or by the existence of a kabuliyat for the year 1245, such a kabuliyat being as much consistent with the confirmation of a pre-existing rent as with the settlement of a new rent: the presumption from uniform payment of rent for twenty years can only be displaced by positive proof to the contrary. —(Soorjamani *v.* Peary Mohun, 25 W. R., 331.) On proof of payment of a uniform rent for twenty years, the presumption imperatively arises from the time of the permanent Settlement.—(Rakhaldas Tewary *v.* Kenooram Haldar, 7 W. R., 242.) For other cases see notes under the head—"*which has not been changed.*" A break or interruption in the holding of the land would be sufficient to rebut the presumption.

A break in the holding.

But if a raiyat holding at particular rent was unlawfully evicted, he would not necessarily cease to hold at that rent. "Eviction, though it would put an end to the raiyat's possession, would not destroy his holding; and therefore if the raiyat is restored to possession, he is restored to his original holding, if that holding would not have ceased to exist but for the eviction."—(Luteefunnissa Bibi *v.* Poolin Behari, W.R., Sp., 91.) The break of one year in twenty is not sufficient to rebut the presumption that the receipts for nineteen years prove the payments of uniform rent.—(3 W. R, Act X, 122: Radha Moyi *v.* Aghorenath, 25 W.R., 384.)

It shall be presumed, &c.—The grounds on which a raiyat can still claim benefit of the presumption in cases where he sets up a pottah may be said to be summarised in the following Full Bench case, where Peacock, C. J., in delivering judgment, says: "Then comes the question, what would comply with those words unless the contrary be shown, or unless it be proved that such rent was fixed at some later period? If a defendant sets up that he came in under a pottah subsequent in date to the time of the Permanent Settlement, it appears by his own showing that he has not held from the date of the Permanent Settlement. Bnt if he should say, "I hold under a pottah prior to the time of the Permanent Settlement, and I have been paying rent for the last twenty years at a uniform rate, and should prove that he had held at the same rate of rent for a period of twenty years next before the commencement of the suit, the fact of his having stated that he held under a pottah would not deprive him of the benefit of the presumption arising from the uniform payment of rent even if he should fail to prove that his pottah was genuine." So, if he were to say "I have held for a period of twenty years at the same rate, and I hold a pattah of a date subsequent to the Permanent Settlement, but that pottah was granted to me in confirmation of a prior holding," that would not rebut the presumption arising from the proof of his having held at a rent which has not been changed for a period of twenty years next before the commencement of the suit. It is only when by evidence or by his own showing it appears that his holding commenced, or that his rent was fixed at a period subsequent to the date of the Permanent Settlement that the presumption created in his favour by s. 4, Act X of 1859, is rebutted. A raiyat is not precluded from the

When benefit of the presumption can be claimed.

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benefit of his having held at a fixed rate of rent which had not been changed from the date of the Permanent Settlement, or of any presumptive evidence to that effect merely from the fact of his stating that he held under a pottah not inconsistent with that presumption, though he might fail to prove the pottah."—(Grish Chunder *v.* Kali Krista, 6 W. R., Act X, 58.) As a confirmation of the views above expressed, the Privy Council says : " A pottah may be a confirmatory grant only ; there is nothing in accepting such a grant inconsistent with the presumption that a prior title existed.—(Ram Chunder *v.* Jogesh Chunder, 19 W. R., 353.) But the setting up of a pottah found to be a forgery was held to be no bar to the presumption arising under this section.—(Ishur Chunder *v.* Nitya Nund, 6 W. R., Act X, 70.)

When benefit can not be claimed.

On the other hand, if a raiyat pleads a holding for more than twenty years, at a uniform rent on a pottah subsequent to the Permanent Settlement, the defence viods the presumption, and the case must be decided according to the pottah.—(Luchmee Persaud *v.* Ram Gholam, 2 W. R., Act X, 130 ; Watson & Co. *v.* Choto Joora, Marsh., 68 ; Hay, 232.) In a suit for enhancement of rent where a lower Appellate Court decided that the tenure originated in 1200 under a kabuliyat, and that there was no presumption under this section, it was held that there was no error of law.—(Mahomed Manoo *v.* Sheik Mahomed Asanullah, 17 W. R., 349; Ramlal *v.* Lalla Petumlal, Marsh., 403 ; Kundu Misser *v.* Gunesh Sing, 6 B. L. R., App., 120; 15 W. R., 193 ; Huree Kishen *v.* Sheik Baboo, 1 W. R., 5 ; Ram Kishen *v.* Meeah Delerali, Sp. W. R., Act X, 36.) But the production of a pottah of a date subsequent to the Permanent Settlement, if not inconsistent with the inference that it is a continuance of a former state of things, will not deprive the raiyat of the benefit of the presumption under this section if he can prove a uniform payment for twenty years, previous to the commenecment of the suit.—(Kishen Mohan *v.* Eshan Chunder, 4 W. R., Act X, 36 ; Peary Mohun *v.* Koylash Chunder, 23 W. R., 53 ; Ram Chunder *v.* Jogesh Chunder, 19 W. R., 35, P. C., Sooja Mani *v.* Peary Mohan, 25 W. R., 331.) The mere existence of a pottah and an amulnama of a date subsequent to the Permanent Settlement is not conclusive evidence that the rate was then changed or was first fixed.—(Luchman Narain v. Koodil Kant, 6 W. R., Act X, 46.) But where a raiyat cannot show that his pottah is only confirmatory of a previous holding, his possession dates from the date of the pottah, and he will not be entitled to the benefit of the presumption.—(Sheik Jainuddin *v.* Poorno Chunder, 8 W. R., 129 ; Watson & Co. *v.* Anjuhna Dasi, 10 W. R., 107.) A person by taking a perpetual pottah after the Permanent Settlement at the same rate as paid by the former holders, must be considered to have acquired a new tenure, and is not protected from enhancement on the ground that the former holders held at the present rate from before the Permanent Settlement.—(Ram Chunder *v.* Romesh Chunder, 2 W. R., Act X, 47.) The presumption will not be rebutted by showing that the estate within which the tenure is situated was not permanently settled in 1793. The section does not apply only to tenures forming part of an estate permanently settled by the permanent settlement of 1793 (Tamasha *v.* Asutosh Dhar, 4 C. W. N., 513).

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The pleadings must be consistent with the fact of holding from Permanent Settlement.

When a defendant wishes to avail himself of the benefit of the presumption of an unchanged rent for twenty years, he must take care that there is nothing in his pleadings which is inconsistent with a holding from the time of the Permanent Settlement. Thus in Watson & Co. *v.* Chota Joora, Marsh., 68, the defendant set up a pottah which had been granted in 1212 at a rent of Rs 12 per annum, and alleged that he had been in possession more than fifty-seven years at the rent, but did not plead possession from the time of the Permanent Settlement; it was held by the Court that the defence itself rebutted the presumption. "Soction 4," observed Peacock, C. J., "makes the payment of rent for twenty years, without alteration of the amount, presumptive evidence that the land has been held at that rent from the time of the Permanent Settlement; and unless the presumption is rebutted, the raiyat is entitled by s. 3 to a pottah at that rate, and his rent consequently cannot be enhanced. But in this case the defendant did not rely upon the fact that the land had been held at a rate of rent which had not been changed from the time of the Permanent Settlement, but upon a pottah alleged to have been granted in 1212, long after the Permanent Settlement. His own defence rebutted the presumption; and although he failed upon the ground that the pottah was not a genuine one, he never alleged in his answer that the rent of Rs. 12 had been paid from the time of the Permanent Settlement, as he ought to have done, if he intended to rely upon that defence."—Marsh., 68. At the same time it is not absolutely necessary that the occupation from the time of the Permanent Settlement should be actually pleaded, provided there is nothing in the defendant's answer inconsistent with such fact. "When the raiyat tenders proof and succeeds in proving that he has paid rent at one uniform rate for twenty years, then the presumption imperatively arises, unless the contrary be shown, that the rent has been unchanged from the time of the Permanent Settlement, and upon that presumption so arising the defendant is entitled to the whole legal consequences of that state of things. If the tenant succeeds in proving that he was held at one uniform rate for twenty years, then the Court is bound to go on, and presume that the land has been held at that rent from the time of the Permanent Settlement."—(Rakhal Das *v.* Kinoo Ram, 7 W. R., 242; see also Hurruck Sing *v.* Toolsi Ram, 11 W. R., 84; Mon Mohan *v.* Husrut Sirdar, 2 W. R., Act X, 39.) To the same effect are Gooroo Das *v.* Sheik Durbaree, 5 W. R., Act X, 16; and Munee Kurnika *v.* Anunda Moyi, 8 W. R., 6; Bhairub Chunder *v.* Muty Mundle, Sp. W.R., Act X, 100.) The defendant therefore need not plead in words that the tenure is "from the Decennial Settlement." A plea that the tenure is the grandfather's, inherited by succession and of long standing, is sufficient.—(Hem Chunder *v.* Purno Chunder, 3 W. R., Act X. 162.) Such terms as "for a long time," "for more than forty or seventy years," "for a long series of years," "from generation to generation," &c., entitles the raiyat to the presumption of this section.—(Ramrathon *v.* Chandra Mukhi, 2 W. R., Act X, 74; Jugo Mohan *v.* Purno Chandra, 3 W. R., Act X, 133; *id.*, 162; Hem Chandra, Raj Kumar v. Musst. Assa, 3 W. R., 170; Nyamutullah *v.* Gobinda Chundra, 4 W. R., Act X, 25; Dhun Sing *v.* Chundra Kant, *id.*, 43;

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Kazee Khoda Newaz *v.* Nobo Kishore, 5 W. R., Act X, 53; Gooroodas *v.* Sheik Durbaree *id.*, 86; Sham Lal *v.* Mudun Gopal, 6 W. R., Act X, 37; Poolin Behari *v.* Nemye Chand, 7 W. R., 472; Rakhal Dass *v.* Kinooram, 7 W. R., 242; Soodistee Lal *v.* Mutee Lal, 8 W. R., 887; Hurruk Sing *v.* Toolsi Ram, 11 W. R., 84; Raja Nilmoni *v.* Ananto Ram, 19 W. R., 393.) The mere fact that the tenant fails to establish the document upon which he rests his allegation that his tenure or holding is of a permanent nature is not sufficient to entitle the landlord to a decree for ejectment. Long possession, coupled with conduct on the part of the landlord and tenant, may give rise to the presumption of a permanency, which, unless rebutted would have the effect of making it conclusive.—Durga Mohan *v.* Rakhal, 5 C. W. N., 801. Of course the consideration of the length of time during which the tenancy has been held, and of the particular character of the acts done by the tenant which are alleged to give rise to that presumption, must depend on the circumstances of each particular case. Where it was found that the defendants and their ancestors had held the land for a considerable time, that the landlord had permitted them to build a *pucca* house upon it, that the house had been there for a very considerable time, that it had been built or added to by successive tenants, and that the tenure had been transferred from time to time by succession and purchase in which the landlord was found to have acquiesced, or of which he could not have been ignorant since he accepted rent from the transferees, it was *held* that the facts were sufficient to warrant the Court in presuming that the tenure was of a permanent nature.—Casperz *v.* Kedarnath, I. L. R., 29 Cal., 738; 5 C. W. N., 858. But where a tenancy was created by a kabuliyat and pottah not containing words of inheritance or of perpetual tenancy, the mere facts that the land had been held by tenants at an unchanged rate of rent for a very long period and that it had been the subject of successive transfers, were held not to warrant the inference that the tenancy was, when first created, intended to be permanent, or was subsequently converted, into such.—Ismail Khan *v.* Nilratan, 6 C. W. N., 352. The words "you are to enjoy the land with great pleasure, "param sukhe" do not create a permanent tenancy.—Devendra *v.* Tetraram, 7 C. W. N., 810.

In some earlier decisions a somewhat different opinion was entertained. Thus it was held that it is only when a raiyat claims to hold from the Permanent Settlement that the presumption arising from twenty years' payment of uniform rent can avail him.—(Sheik Ekram *v.* Bibi Bahoorun 2 W. R., Act X, 68.) A plea of holding at the same rent for forty or fifty years is not sufficient to raise the presumption.—(Ghose Sing *v.* Ottur Sing, 4 W. R., Act X, 15), and the admission by a raiyat that his tenure was acquired by his father thirty or thirty-five years ago, rebuts it.—(Mugni Moyi *v.* Huro Chunder, 6 W. R., Act X, 27.) A landlord's admission that the raiyat has held a tenure for thirty or thirty-two years at the same rent does not amount to an admission that the land has been held at that rate of rent from the Permanent Settlement, but on the contrary it states that tenure commenced at a much later period.—(Peary Mohan *v.* Radha Madhab, 10 W. R., 427.) Where the defendant did not expressly plead that he had held at a fixed rate

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from the time of the Permanent Settlement, but stated that he had paid an uniform rent since 1829, the Court held that his answer in no way rebutted the presumption. "The defendant," observed Norman, J., "stated his title as well as he could, alleging payment of rent at a unifrom rate from 1829, nearly forty yaers ago, as far no doubt, as his recollection can go, and says in effect; "I claim the presumption that the rate was fixed from an earlier period, that is to say from a time prior to the Permanent Settlement."—(Poolin Behari *v.* Nemye Chand, 7 W. R., 472.) It must be observed in this case that the defendant did not plead that his tenaney commenced in 1829, but merely produced proof to show that he had paid a unifom rent since 1829; and the Court inferred from the particular facts of the case that he meant to plead that his tenancy started from the time of the Permanent Settlement. Thus when a raiyat pleads that he and his family had held certain lands from generation to generation and claims the benefit of the twenty years' presumption, he will be supposed to have dated his claim from the time of the Permanent Settlement. Thus when a raiyat pleads that he and his family had held certain lands from generation to generation and claims the benefit of the twenty years' presumption, he will be supposed to have dated his claim from the time of the Permanent Settlement; but where a tenant fixes some particular date, as the one from which his tenancy commenced, no matter how remote that may be, if subsequent to the Permanent Settlement, he cannot claim the benefit of the presumption arising under this section.—(Miturjeet Sing *v.* Toondun Sing, 3 B. L. R., App., 88; 12 W. R., 14; Kanda Misser *v.* Gunesh Sing, 15 W. R., 193); so where in a suit for enhancement a raiyat or talukdar pleads the section and claims the benefit of the presumption of the section, it is tantamount to his having named the Permanent Settlement.—(Dhun Sing *v.* Chundra Kant, 4 W.R., Act X, 43.) A raiyat is not precluded from the benefit of the presumption under this section, merely by reason of his stating that he holds under a pottah not inconsistent with that presumption, though he may fail to prove the pottah.—(Grish Chunder *v.* Kalee Krista, 6 W. R., Act X, 57, F. B.; Karoonamayi *v.* Sib Chundra, *id.*, 50; Haronath *v.* Kamala Kanta, 5 W. R., Act X, 56; Peary Mohan *v.* Koylas Chunder, 23 W. R., 58). If a raiyat sets up a mokurari pottah as an answer to a landlord's claim to enhance his rent, and fails to prove the pottah, or the pottah produced by him is held to be forged, the landlord is not necessarily entitled to enhance the rent to the full amount claimed, but only to a fair and equitable rate having regard to the grounds of enhancement.—(Issur Chundra *v.* Nityanund, 6 W. R., Act X, 70, F. B.) A forged document does not prevent a party to a suit from claiming an adjudication on ther evidence of such portion as his claim as is true.—(Rani Swarnamayi *v.* Maharaja Suteesh Chunder, 2 W. R., P. C., 13.) The fact of a raiyat's having relied upon a mokurari tenure cannot prevent his falling back on the presumption arising under this section.—(Chamarni *v.* Ainulla Sirdar, 9 W. R., 45.)

This section makes no exception in favour of khamar land.—(Ram Coomar Raghoonatha, 1 W. R., 356.) The presumption does not arise in a suit brought by a raiyat to have his jumma declared mokurari.—(Dukina Mohan *v.* Kareemalla, 12 W. R., 243.); so in the case of Ishan

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Chunder *v.* Bhyrab Chunder, 21 W. R., 25, Kemp, J., observed: "We think the Subordinate Judge was wrong in raising the presumption under section 4. The suit is a declaratory suit, and such a suit is not provided for either by Act X of 1859 or Act VIII of 1869 (B. C.). It is a declaratory suit brought by the raiyat in the Civil Court to establish his title. The plaintiff therefore must prove his case by written contract such as a pottah or by satisfactory evidence, that his tenure was in existence at the time of the Permanent Settlement, and he has paid a uniform rate of rent ever since."

A break in the holding rebuts the presumption.

In rebutting the persumption arising from a twenty years' holding, the landlord must show either that the rent has been changed, or that the rent was fixed subsequent to the Permanent Settlement. A break or interruption in the holding would be sufficient to rebut the presumption, but if a raiyat holding at a particular rent was unlawfully evicted, he would not necessarily cease to hold at that rate.—(Luteefunnesa Bibi *v.* Poolin Behari, W. R., Sp., 91.) Nor is a tenant's protection swept away by a revenue-sale.—(Saduk Sirdar *v.* Sremati Mahamoyi, 5 W. R., Act X. 16; 1 Ind. Jur., 77.) The break of one year in twenty is not sufficient to set aside the presumption that the receipts for nineteen years prove about the payment of uniform rent.—(3 W. R., Act X, 123.) In a suit relating to four *jummas* in the possession of the same persons, in which it was proved that three of the *jummas* had been held at the same rate for tweenty years, but that the 4th having been purchased only eighteen years previously by the said person, had not been longer in their own possession, it was held that the presumption might arise that the *jumma* itself had been held at an unchanged rent for twenty years, and that the lower Courts were justified in inferring that such had been the case.—(Radha Moyi *v.* Aghore Nath, 25 W. R., 384.) "We think," observed Jackson J., in this case, "that although the *dakhilas* in respect of that *jumma* went back to eighteen years, being the whole time that has passed since the *jumma* was purchased by the defendants, the Court was at liberty to infer that it had continued to be held at an unchanged rent for twenty years."

But not if the tenant has been unlawfully ejected.

The presumption only applies to raiyats and tenants.

It must be remembered that it is only tenants who can claim the benefit of the presumption under this section. Thus where several joint owners by arrangement among themselves permit one of their number to hold a portion of the joint property, paying a sum to others, this arragement does not convert the occupier into a raiyat holding land at a particular rate of rent. It is a temporary arrangement among the joint ewners of a particular time and cannot, either with or without a further holding, such as is here shown, be a basis for the presumption mentioned in this section.—(Raghoobun *v.* Bishen Dutt, 2 W. R., Act X. 92.) It seems, however, that when one co-sharer holds land in excess of his share at an agreed rent, he can be sued for such rent by the other. —(Kalee Pershad *v.* Shah Lutafut, 12 W. R., 418; and the same opinion is held in Alladin Dasi *v.* Sreenath Chunder, 20 W. R,, 258); and this section will also apply to lands which had been held under an invalid lakheraj grant, and had been resumed

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subsequent to the Permanent Settlement.—(Beni Madhub *v.* Bhagbut Pal, 20 W. R., 466.) When, however, a raiyat sets up an adverse proprietary title to his landlord, which he fails to establish, he is not entitled to the benefit of the presumption. In the case of Panday Bishonath the defendant pleaded that he was a jaghirdar, but being unable to prove his jaghir title, he was not allowed to fall back upon any right which he might have acquired from any lengthened occupation of the land. "A party," the Court observed, "may have subordinate rights awarded when they *arise out of the principle right which he pleads*. But when a party pleads distinctly a jaghirdar's proprietary right against a malik's proprietary right, a Court cannot award a subordinate right of occupancy, which in no way arises out of a jaghirdar's proprietary right, but out of a regular right never pleaded by defendant, and, in fact, incompatible with defendants' case."—(Panday Bishonath *v.* Bhagvut Sing, 7 W. R., 145.) In other words where a defendant has held as a trespasser, and not as a raiyat, he cannot claim the benefit of the presumption which the law makes in favour of tenants.

Tenants in khas mehal.

The presumption will apply to tenants of khas mehal. The resumption by Government of a parent estate does not nullify the existing rights of a howladar within that estate, or deprive him of the presumption arising under this section.—(Mathuara Nath *v.* Sheeta Moni, 9 W. R., 354.) The definition of 'proprietor' now includes Government, and the tenant of a khas mehal is therefore in the same position as that of an ordinary proprietor.

Occupancy-raiyat.

In one case it was held by the Calcutta High Court that the presumption relating to the fixity of rent did not apply to occupancy-raiyats.—Bansi Das *v.* Jugdip, I.L.R., 24 Cal., 152. This view has been overruled by the Full Bench, which has held that occupancy-raiyat are entitled to the benefit of the presumption under sub-section (2) of section 50 and that where it was proved that such raiyats had held their lands at a uniform rent for twenty years the Assistant Settlement-officer was right in recording them as "raiyats holding at fixed rates."—Dulhin Golab Koer *v.* Balla Kurmi, I. L. R., 25 Cal., 744.

Whether the presumption applies to a talukdar.

In any suit or other proceeding under this Act:—Probably the words "in any suit under this act" were not intended to limit the presumption to cases under this Act.—(*Per* Norman, J., in Dukhina Mohan *v.* Kureemalla, 12 W. R., 243.) Under this ruling it was doubtful whether the presumption of twenty years could not be urged in a suit by a zemindar against a talukdar for enhancement of rent under Reg. VIII of 1793, s. 51. This point was settled under the old law by the decision of Hurro Nath *v.* Gobind Chunder, 23 W. R., 352; P. C., their Lordships holding that even a dependent talukdar who, under s. 51, Reg. VIII of 1793, might otherwise be liable to enhancement was exempted by s. 15, Act X, if he held his tenure otherwise than under a terminable lease and at a fixed unvarying rate from the Permanent Settlement. In a recent decision, however, it has been held that the presumption cannot arise except in a suit or proceeding under the Act.

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—Rasamay Parkait *v.* Sreenath Moyra, 7 C. W. N., 132. It cannot arise in a suit for damages under the Small Cause Court Act.—Nilmani Maitra *v.* Mathurà 4 C. W. N., clix. Where a suit was brought by the plaintiff for recovery of possession against certain persons alleged to be "trespassers," the defendants claiming to hold as tenants, the action was not a suit or proceeding under the Act until the defendants' allegation was established.—Rasamay *v.* Sreenath, 7 C.W.N., 132.

Sub-section (3):—This sub-section explains the effect of consolidation of several *jummas* into one and of sub-division of one *jumma* into many. Where a number of *jummas* which have been held at fixed rates are consolidated into one holding, the fixity of rent is not affected by the consolidation.—(Kazee Khoda Newaz *v.* Nubo Kishen, 5 W. R., Act X, 53; Sukhomoni *v.* Gungagobinda, Sp. W. R., Act X, 52.) "This principle applies equally to *jummas* which have been derived in part or in whole with the consent of the landlord and which are subsequently consolidated into one *jumma*. The presumptions of s. 4 are not restricted to holdings, but refer simply to the fact that land has been held by a raiyat at a rent which has not been changed for a period of twenty years, before the commencement of the suit."—(Rajkshore *v.* Hureehur, 10 W. R., 177; Kashinath *v.* Bamasundari, *id.*, 429.) In the same way the sub-division of a holding does not necessarily destroy the continuity of the tenure in respect to the rate of rent. The question in such cases is whether "the rate of rent paid for each bigha has remained unchanged for the period prescribed by law." If it has, that rate cannot be altered. The zemindar by consenting to a sub-division of, addition to, or subtraction from, the total holding of the raiyat, dose not destroy the continuity of the tenure in respect of the rate of rent, and the rent paid for each bigha of land. It is undoubtedly true that the zemindar might refuse to consent to a sub-division of the tenure or to a contraction of the holding, and might say, "I will hold the whole tenure responsible for the whole rent."—Hills *v.* Hurolal, 3 W.R., Act X, 135. Similarly the division of a raiyat's tenure among his heirs does not destroy the continuity of the holding, and as long as the entire rent is paid by their joint contributions, the old holding will be preserved; but the entire holding will be vitiated if one of the jont tenants make default.—(Hills *v.* Bisharuth, 1 W.R., 10.) If the rent of one share is enhanced, the rent of the whole tenancy is liable to enhancement.—(Surat Sundari *v.* Anando Mohun, I.L.R., 5 Cal., 273; 4 C. L. R., 448.) If it be found that one of the holdings constituting the tenure has been created since the Decennial Settlement, the tenant cannot ask for the benefit of the presumption in respect of the rent only.—(Moula Buksh *v.* Judunath, 21 W. R., 267.) But the alienation of a portion of a permanent tenure by one of several co-tenure-holders will not work a forfeiture of the whole tenure.—(Dasarathi Hari Chandra *v.* Ram Krishna, I. L. R., 9 Cal., 526.) When a tenant holding land which had paid a uniform rate, since the Permanent Settlement relinquished a portion of his holding, and received a fresh pottah from his landlord, in which a deduction was made for the relinquished land, it was held that the fixity of rent for the remaining portion was not affected by the arrangement. The pottah was merely the confirmation of the tenancy already

Effect of consolidation and sub-division.

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existing—(Kenaram *v.* Ramkumar, 2 W. R., Act X, 17.) The sale of a portion of a tenure involving a distribution of rent over two parts does not amount to a change of rent within the meaning of this section.—(Soodha Mukhi *v.* Ramgati, 20 W. R., 419.)

Sub-section (4):—The probable meaning of this clause is that at the time when the enhancement is sought, if the tenure is a terminable tenure, the presumption will not arise.

Terminable tenures.

51. If a question arises as to the amount of a tenant's rent or the conditions under which he holds in any agricultural year, he shall be presumed, until the contrary is shown, to hold at the same rent and under the same conditions as in the last preceding agricultural year.

Presumption as to amount of rent and conditions of holding.

Holding over:—If, after the expiration of a lease a landowner continues to receive rent for a fresh period, he must be considered to have acquiesced in the tenant's continuing to hold upon the terms of the original lease, and cannot turn out the tenant or treat him as a trespasser, without giving him a reasonable notice to quit:—Ram Khelwan *v.* Musst. Soondra, 7 W. R., 152; see also Ooma Lochun *v.* Nittye Chand, 14 W. R., 467; Jumaut Ali *v.* Chowdhury Chutturdharee, 16 W. R., 185; Chaturi Sing *v.* Makund Lal, I. L. R., 7 Cal., 710, 9 C. L. R., 240. Where a tenant holds over, after the expiration of his lease, he does so on the term of the lease, on the same rent and on the same stipulation as are mentioned in the lease until the parties come to a fresh settlement: Kishore Lal *v.* The Administrator-General of Bengal, 2 C.W.N., 303, see also Srimaty Altab Bibee *v.* Jogul Mundal, 25 W. R. 234; Sheo Sahey *v.* Bechun Sing, 22 W. R. (31) 32; Tara Churn *v.* Ameer Mundal, 22 W. R. (394), 395; Shaik Enayatullah v. Sheikh Eaheebaksh, W. R. 1864, Act X p. 42, Sreemutty Altub *v.* Joogul Mandul, 25 W. R. 234. There is no general rule of law to the effect that the lease of an agricultural tenant in this country who holds over, must be taken as renewed from year to year, and if any contract is to be implied, it should be taken to have been entered into so soon as the term of the lease expired rather than at the beginning of each year:—Kishore Lal *v.* The Administrator-General of Bengal, 2 C. W. N. 303. But it has been held that when an agricultural tenants holds over, his tenancy is from year to year:—Administrator-General of Bengal *v.* Asraf Ali, 28 Cal., 227, (at p. 233); (see Ali Mahomed *v.* Bhagabati, 2 C.W.N., 525.) Where the term of a kabuliyat expired some years before the passing of the Bengal Tenancy Act and the tenant continued to hold over after the expiry of the lease, *held* that the tenant was liable to pay interest at the kabuliyat rate even after the passing of the Bengal Tenancy Act: *Ibid.* But where an agricultural tenant continued to hold over after the expiry of the lease in 1881, held that the landlord could not recover interest at the rate mentioned in the lease but was entitled to interest at the rate provided for in s. 67 of the Act.—Administrator-General of Bengal *v.* Asraf Ali, 28 Cal., 227; their Lordships (Ameer Ali & Brett, JJ.), in delivering judgment observed as follows:—"Supposing the contract was expressly renewed

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after the passing of the Act and the stipulation as to interest was embodied in a new lease, the tenant would not be bound by it and the stipulation would not be enforceable under the law. It would be anomalous to hold that what cannot be done by a lease may be done by allowing the tenant simply to hold over." See also Alim *v.* Satis, 24 Cal., 37.

Ejectment.

When a tenant holds over he may be ejected on the expiration of lease without the intervention of Court:—Chowdhry Izharool *v.* Bhoosee Mahton, 25 W. R., 201. For the ejectment of a non-occupancy raiyat upon the expiration of the term of his lease there must be a notice to quit, and not only a notice to quit, but a notice served on the raiyat not less than six months before the expiration of the term :—Goburdhone *v.* Karuna, I. L. R., 25 Cal., 77. A tenant holding over after an expired lease would generally be considered as lawfully in possession, and as having an interest in the land, and where such a tenant who holds over is dispossessed he has a right to be restored to possession and has the same right if, having been ejected during his lease, his lease expires pending a suit to recover possession :—Shaikh Arub *v.* Ashruf : 24 W. R., 335.

Agricultural year:—See section 3 (11) p. 33 *ante.*

Onus.

Rate of Rent :— This section provides that a tenant shall be presumed, until the contrary is shown, to hold at the same rent and under the same condition, as in the last preceeding agricultural year. In a suit to recover arrears of rent from the defendants who, as ticcadars of the plaintiff's share in a certain mouzah, had been in possession from 1262 to 1281 without having paid any rent, the plaintiff who claimed a bhaoli rent at the rate 9 annas of the crop, proved that in the mouzah in question the raiyats paid rent at that rate. *Held* that under the particular circumstances the *onus* was on the defendants who alleged that the proper rate was 8 annas to prove their allegation.—(Lochan *v.* Anup, 8 C. L. R., 426.)

Burden of proof.

The mere fact that a tenant some time ago gave a kabuliyat for a limited period at a particular rate of rent is not sufficient in itself to throw upon the defendant theentire burden of proving what the present rent is, without any evidence on the part of the landlord that the rent specified in the kabuliyat had ever been realised from him :—Mukund *v.* Arpan, 2 C. W. N., 47.

Until the Contrary is Shewn :—The existence of a decree for enhanced rent, even if the landlord accepted the old rent for some years after the passing of the decree rebuts the presumption.—(Lander *v.* Binode Lal, 6 W.R., Act X, 37.) A decree for enhancement having been obtained the zeminder agreed that the tenant should be allowed to hold a lease at a less rent for a certain number of years on certain conditions. After the expiration of the period fixed by the lease, he sued to recover rent at the rate declared payable by the enhancement decree. *Held*, that the effect of the argument was to suspend the decree, and in the absence of a provision in

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the lease for revival of the decree on the expiration of the term limited, the plaintiff must have recourse to the procedure laid down by the enhancement provisions of Act VIII B. C. of 1869, if the seek to recover a higher rent than that paid under the lease—(Nobin Chandra *v.* Gour Chandra, I. L. R., 6 Cal., 759; 8 C. L. R., 161). So in Burhunnadi *v.* Mohan Chandra, 8 C. L. R., 508, the defendant being, under a settlement originally obtained from the Government, bound to pay a particular rent to the plaintiff who had subsequently to that settlement obtained an ijara from the plaintiff in 1879, sued to enhance that rent and obtained a decree upon which a compromise was made, the defendant agreeing to pay a higher rent for the years 1281 and 1282. The defendant having paid no rent for 1283 and 1284, the plaintiff sued for the arrears at the higher rent. *Held,* that no proper proceedings for enhancement having been taken, or fresh contract with the defendant entered into, the special arrangement came to an end at the expiration of 1282, and the original arrangement revived, and therefore the plaintiff was not entitled to demand more than the original rent payable. A decision in a previous rent suit as to the amount of rent annually payable was held not to operate as *resjudicata* in a suit for the rent of subsequent years, although it was held that it gave rise to a presumption under this section that the rents for subsequent years remained the same.—Beni Pershad *v.* Raj Kumar, 6 C. W. N., 589.

Limitaiton :—Under art. 139, Sch. II., of the Limitation Act time begins to run against a landlord when the period of a fixed lease expires, when there is no evidence from which a fresh tenancy can be inferred, and not at some indeterminate date after that period (Kantheppa *v.* Sheshappa, I. L. R., 22 Bom., 893).

Alteration of rent on alteration of area.

52. (1) Every tenant shall—

Alteration of rent in respect of alteration in area.

(*a*) be liable to pay additional rent for all land proved by measurement to be in excess of the area for which rent has been previously paid by him, unless it is proved that the tenure or holding of land which having previously belonged to the tenure or holding was lost by diluvion or otherwise without any reduction of the rent being made; and

(*b*) be entitled to a reduction of rent in respect of any deficiency proved by measurement to exist in the area of his tenure or holding as compared with the area for which rent has been paid by him, unless it is proved that the deficiency is due to the loss of land which was added to the area of the tenure or holding by alluvion or otherwise, and that an

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addition has not been made to the rent in respect of the addition to the area.

(2) In determining the area for which rent has been previously paid, the Court shall, if so required by any party to the suit, have regard to—

(*a*) the origin and conditions of the tenancy, for instance, whether the rent was a consolidated rent for the entire tenure or holding;

(*b*) Whether the tenant has been allowed to hold additional land, in consideration of an addition to his total rent or otherwise, with the knowledge and consent of the landlord;

(*c*) the length of time during which the tenancy has lasted without dispute as to rent or area; and

(*d*) the length of the measure used or in local use at the at the time of the origin of the tenancy, as compared with that used or in local use at the time of the institution of the suit.

(3) In determining the amount to be added to the rent, the Court shall have regard to the rates payable by tenants of the same class for lands of a similar description and with a similar advantage in the vicinity, and, in the case of a tenure-holder, to the profits to which he is entitled in respect of the rent of his tenure; and shall not in any case fix any rent which, under the circumstances of the case, is unfair or inequitable.

(4) The amount abated from the rent shall bear the same proportion to the rent previously payable as the diminution of the total yearly value of the tenure or holding bears to the previous total yearly value thereof, or, in default of satisfactory proof of the yearly value of the land lost, shall bear to the rent previously payable the same proportion as the diminution of area bears to the previous area of the tenure or holding.

"(5) When in a suit under this section the landlord or tenant is unable to indicate any particular land as held in excess, the rent to be added on account of the excess area may be calculated at the average rate of rent paid on all the lands of the holding exclusive of such excess area." (Act III of 1898, s. 6.)

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Extended to Orissa (Not. Oct. 17th, 1896.)

Application of the Section:—Where the terms of the *pottah* were that the whole of the lands being brought under cultivation, the landlords would be at liberty to measure the lands of the *ganti*, and if the land be found in greater quantity than 150 bighas, the tenant would pay rent at the rate of 10 ans. per bigha, and the lands being found greater than the said quantity, the plaintiff, one of the co-sharer landlords, brought a suit for rent at that rate for the whole area claiming his own share, making the other co-sharer landlords as defendants, *held* that the suit was maintainable at the instance of the plaintiff alone and that it was not a suit to alter the rent under the provisions of this section :—Dintarini *v.* L. P. D. Broughton, 3 C. W. N., 225. A suit for arrears of rent under the terms of a kabuliyat at the original rate specified in the kabuliyat in respect of the land demised, part of which left unassessed at the time by reason of its not being then culturable is not a suit for enhancement in the ordinary sense of the term, nor even is it a suit for additional rent for land found in possession of the tenant in excess of what he was paying rent for, and where a co-sharer landlord is in separate receipt of his share of the rent there can be no bar to his maintaining a suit for recovery of arrears of his share of the rent :—Ram Chunder *v.* Giridhur, I.L.R., 19 Cal. 755. It was held in the case of Richard De Courey *v.* Meghnath, 15 W. R., 157, that the rent of a tenure protected from enhancement under the provisions of sec. 4 of Act X of 1859 could not be increased on the ground of excess land.

Suit upon kabuliyat for rent of land a part of which was unassessed at the date of kabuliyat.

Tenure protected from enhancement under s. 4 of Act X of 1859.

In a case where the tenants took possession of certain lands by gradual encroachment, and some of the landlords brought a suit for recovery of their share of the encroached lands or for assessment of rent and made their co-sharers parties : *held*—that the plaintiff not having treated the defendants as trespassers from the beginning the defendants must be treated as tenants of those lands apart from their tenancy in respect of the holding ; that it is altogether a new holding and the rent that would be assessed upon that would be a new rent in respect of the new holding and a suit for the assessment of rent is not an act that is authorised by sec. 188 of the Bengal Tenancy Act, and sec. 52 does not apply. But where a co-sharer landlord claimed for *khas* possession with an alternative claim for rent, not merely of the additional land found in possession of the tenants over and above the land of their own holding but in respect of the entire quantity of land found in possession of the tenants including the lands of their own holding ; *held* that sec. 52 of the Bengal Tenancy Act applied.—4 C. W. N., 508.

Encroachment regarded as a new holding.

Exception.

A *kabuliyat* executed before the passing of the Bengal Tenancy Act by defendant No. 1, the holder of a *darmourasi pottah*, in favour of his immediate landlord, a *mokuraridar*, provided that the former should have his name entered in the zemindar's *sherista* in place of the *mokuraridars* and pay rent direct to the zemindar, and

Kabuliyat before the passing of the Bengal Tenancy Act.

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also, in case the area of the tenure should exceed certain bighas, that he should pay rent on each excess bigha at the rates of 12 annas and 2 annas to the zemindar and the *mokuraridar* respectively. The agreement was ratified by the zemindar. On the zemindar suing defendant No. 1 for measurement of the tenure and enhancement of rent, it was objected that under the *kabuliyat* only the *mokuraridar* was entitled to sue for such measurement: *held*—That though they were both landlords of defendant No. 1, they were not joint landlords within the meaning of sec. 188 that even if they were joint landlords, by their subsequent conduct, in collecting rent and suing separately, they had ceased to be so; that, further, as the *kabuliyat* upon which the suit is based, was executed prior to the passing of the Bengal Tenancy Act, the suit was not under sec. 52, Bengal Tenancy Act, and so would not be barred by the provisions of sec. 188, Bengal Tenancy Act:—Matungini Dassi *v.* Ram Das Mullick 7 C. W. N., 93.

Notice:—No notice of enhancement is necessary under this Act. See s. 30, pp. 155-6, *ante*. Under all the old law, no suit for enhancement on account of accretion would lie unless a proper notice of enhancement was previously given.—(Brojendra Kumar *v.* Upendra Narain, I. L. R., 8 Cal., 706; Ramnidhi *v.* Parbati Dasi, I. L. R., 5 Cal., 823; Huro Sundari *v.* Gopee Sundari, 10 C. L. R., 539; Shurosvati Dasi *v.* Parbati Dasi, 6 C. L. R., 362; 10 W. R., F. B., 33; Dwarkanath *v.* Baburam, I. L. R., 9 Cal., 72.)

Tenant:—The word 'tenant' includes tenure-holders, raiyats of three classes, and under-raiyats, see s. 4. So that even a raiyat at a fixed rate is subject to this section, and his rent may be enhanced by re-measurement of his area for surplus land in possession. The principle upon which this section has been enacted is that and additional rent for excess land in possession of the tenant is no enhancement. Hence this provision has been removed from the enhancement section and enacted as a separate rule. The term "tenant" in this section does not include the case of a mere co-sharer tenant who has only a fractional share in the tenure; it means tne tenant of the tenure, not one of many tenants. In a suit for arrears of rent by some of several joint landlords against one of several joint tenants who had for many years paid rents to the plaintiffs in respect of the plaintiffs' 3 ans. 3 pies share. It was held that the defendant was not entitled to claim abatement under sub-section (1), cl. (b), but that his proper remedy was by suit making all the co-sharer landlords and tenants parties.—Bhupendra *v.* Roman, 4 C. W. N., 107; I. L. R., 27 Cal., 417. When a tenure or holding is sold, the auction-purchaser has the right to claim any abatement which may have allowed to his predecessor.—Kali Prosunno *v.* Dhanunjai, I.L.R., 11 Cal., 625.

This provision is not restricted simply to occupancy raiyats but to all tenants.

Fractional Co-sharer:—S. 188 requires that where two or more persons are joint proprietors they must all join in bringing a suit additional rent for additional area:—Gopal Chunder *v.* Umesh Narain, 17 Cal., 695. But when the lands for which rent is claimed form no part of the original holding, and are outside its boundaries, section 188 does not bar a suit by a fractional co-sharer, because the right to claim rent is

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inseparable from the landlord's position, and is not a thing merely authorised by this Act :—Khandkar Abdul Hamid *v.* Mohini Kant Saha [1900], 1 C. W. N., 508. See also Gobind Chandra Pal *v.* Hamidulla Bhinan [1903], 7 C. W. N., 670 noted under section 188, *post*.

Sub-section 1 (a): Excess lands liable to measurement:—To entitle a plaintiff to a decree for increased rent on the ground of an alteration in the area of the defendant's holding, the plaintiff must show that the defendant is holding land in excess of what he is paying rent for, and, in order to do that, he must show for what quantity of land the defendant is paying rent :—Surjo Kant Acharji *v.* Baneswar Shaha, I.L.R., 24 Cal., 251. A decree for additional rent on account of additional land cannot stand merely on the ground that the defendant's land as now measured by a particular standard is larger in area than the defendant admits. It must be shown that the defendant is in possession of more land than he has been previously paying rent for, or that the rent which he has been paying was not payable for the whole of the land which is in his possession, or that the pole with which the defendant's land has now been measured was the pole with which it was measured in the first instant :—Alif Khan *v.* Raghu Nath Prasad, 1 C. W. N., 310. It has, also, been held that the provisions of section 52 are applicable to settlement proceedings under Chap. X of this Act, and that the mere fact, that on a measurement made by a zemindar under the authority of Government given under Chapter X of this Act, it is found that the tenants generally are in possession of lands in excess of the areas entered in his zemindari papers and their rent-receipts would not necessarily prove that he is entitled to additional rent for the excess areas :—Gouri Patra *v.* Rely I. L. R., 20 Cal., 579. In the case of Sheoratan Koer *v.* Sobh Gond, Rule 266 of 10th Sept., 1895, (unreported) circulated with Board of Revenue's C. O. No. 1 of March, 1896, it was pointed out that when in settlement proceedings the tenants admitted the landlord's claim to additional rent for excess lands, each of the tenants should be asked by the Settlement Officer what he understood and admitted to be the represenation of the area of his previous holding, and that, then, the Settlement Officer would be in a position to determine whether on the new measurement such tenant was liable to additional rent on excess lands. The expression "the area for which rent has been previously paid" in this section, sub-sec. 1, cl. (a) means the area with reference to which the rent previously paid had been assessed or adjusted ; a landlord cannot therefore successfully claim additional rent in respect of an excess of area, when he fails to shew what the area of the tenure was when first created, and that the rent originally fixed did not cover and was not intended to cover such excess area :—Rajendra Lal *v.* Chunder Bhusan, 6 C. W. N., 318.

Chapter X : Excess area.

It very frequently happens that a lease which conveys a certain number of bighas with certain defined boundaries, contains in reality a greater quantity of land than is specified ; and the question whether this excess land is liable to assessment furnishes a constant cause of litigation. It seems, however, to be tolerably settled by a number of recent

Leases with defined boundaries.

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decisions that, where the boundaries are given, the lease covers all the land included within those boundaries, whether in excess of the quantity specified or not. In such cases the lease is not to be construed as a lease of so many bighas and no more, but as a lease of certains lands, the number of bighas being added more by way of description than of limitation.—(See Janaki Bulluv *v.* Nobinchandra, 2 W. R., Act X, 33; 2 Board's Rep., 365; Modie Hudden *v.* Sandes, 12 W. R., 439; Abdool Mena *v.* Barada Kant, 15 W. R., 394; Shib Chunder *v.* Brojo Nath. 14 W. R., 301; Pahalwan *v.* Mohesur, 16 W. R., P. C., 5; Farquesson *v.* The Government of Bengal, 16 W. R., P. C., 29; Indra Bhusan *v.* Goluk, 12 W. R., 350. In Pahalwan Sing *v.* Maharaja Maheswar Baksh Sing Bahadur, 9 B.L.R., 169, the 16 W.R., P.C. 5; Judicial Committee observed: "The plaintiff is to recover it according to the boundaries given in the plaint. It is true, it goes on to specify the quantities, but it turns out that those quantities are not strictly accurate. Then the question is, which is he to recover, the quantities or according to the boundaries given in the plaint? Their Lordships think that it must be interpreted as if it were a conveyance of land stating the boundaries, and then saying that it contains so many acres; of course, the real conveyance would be of the land within the boundaries, and it would be a mere false description that there was some slight mistake in the quantities. Their Lordships think that that principle ought to be applied to the case because they find it among the rules that prevail in the Courts in India." So in another case where the land leased consisted of several old holdings, some of which had been abandoned by the former occupiers, and one of which had previously been in the occupation of the defendant and the description of the quantity in the kabuliyat purported to be taken from other old measurement papers, and it was probable that the land itself, the subject of the lease, must have been known to the defendant, the Court remarked: "Under these circumstances, we think, it would be no defence to this suit for rent even if the defendant could succeed in establishing that the quantity of land is in fact not so great as the quantity mentioned in the kabuliyat. The defendant, probably knowing the land for which he was in treaty, there is no reason to suppose that he was misled, or that he has not substantially that land, and he cannot now evade the payment of the rent contracted by availing himself of the error or misdescription (if it exists) of the actual quantity given in the kabuliyat."—(Tripp *v.* Kali Das, Sp. W. R., Act X, 122; see I. L. R., 20 Cal., 379.)

Include all land within those boundaries.

Where, however, a lease merely conveyed so many bighas of land without specification of boundaries, the tenant would, under ordinary circumstances, be bound to pay rent for any excess land he might hold—(Bipradas Dey *v.* Musst, Sakermani Dasi W. R., Act X, 1864, 38: 2 Board's Rep., 57.)

But where boundaries are not specified, the raiyat must pay for all excess land he holds.

It has been held that when a raiyat holds in excess of the area leased to him he is liable to enhancement—(Raj Mohan v. Issur Chunder, 8 W. R., Act X, 19; 3 W. R., 14; David *v.* Ramdhun, 6

Excess by Encroachment.

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W. R., Act X, 97; Shama Jha *v.* Doorga Roy, 7 W. R., 122; Golam Ali *v.* Baboo Gopal Lal Thakur, 9 W. R., 65; Goopeenath *v.* Ram Tukee, 9 W. R., 476). In some decisions under the old law a raiyat who held land in excess of the quantity included in his mokurari pottah was treated as a trespasser, and it was held that he could not be sued for enhancement in respct of it—(Roshun Bibi *v.* Bissonath, 6 W. R., Act X, 57); In the case of Prankishen, *v.* Monomohini, 17 W. R., 33, Couch, C.J., observed: "We think that the judgment of the Privy Council which has been followed by the late Chief Justice (Sir Barnes Peacock) in the case reported in 6 Weekly Reporter Act X, p 57, is to be reconciled with the provisions of section 17, Act X, of 1859, clause (*b*), by considering that the clause is applicable to cases where the land was undoubtedly included in the original tenure, but upon a fresh measurement it has has been found that there was some mistake in the former measurement, and that a greater amount of rent ought to be paid in respect not of any fresh land, but in respect of land which was included in the original tenure. * * * The Judicial Committee of the Privy Council say in Rajah Sutta Surun *v.* Mohesh Chunder and Tarini Churn, (12 Moore's Indian Appeals, p. 274; 11 W. R.. P. C., p. 11) 'a suit for enhancement implies such a privity of title or tenure existing between the parties that a claim for some rent is legally inferable from it, and there is here proof that that relation is denied to have existed in respect of these two parcels of land. As to the latter portion, where the respondent's title is denied, and the claim of another zemindar set up, the proper remedy seems to be by a suit in the nature of an ejectment.' Hereto it was denied that in respect of this land, the relation had existed. * * * Sir Barnes Peacock says, in the case in 6 Weekly Reporter Act X, p. 157, that "if the party has not been paying anything for the excess, he may be a trespasser as to the excess, but he is not a tenant liable to assessment. This case before Sir Barnes Peacock is more strictly applicable to the present case than the judgment in the Privy Council."—See also Binode Bihari *v.* Masseyk, 15 W. R., 483. In other decisions it has been, held that when a tenant holds excess lands for which no rent has hitherto been paid the zeminder may treat him either as a tespasser or as a tenant—(David *v.* Ramdhun, 6 W. R. Act X, 97; Rajmohun *v.* Gooro Churn, 6 W. R., Act X, 106; Seik Ahmed Hossein *v.* Musst. Bandee, 15 W. R., 91; Binode Beharee *v.* Masseyk, 15 W. R., 493). In the latest of the decisions on this point, *e. g.*, Gooroo Das *v.* Issur Chunder, 22 W. R., 246, Mr Justice Markby distinguished the cases reported in the 6th Weekly Reporter, p. 57, and 17th Weekly Reporter, p. 33, and observed: "We think the true presumption as to encroachments made by a tenant during his tenancy upon the adjoining lands of his landlord is that the lands so encroached upon are added to the tenure, and from part thereof for the benefit of the tenant so long as the original holding continues, and afterwards for the benefit of his landlord, unless it clearly appeared by some act done at the time that the tenant made the encroachment for his own benefit. This is the clear rule of English law which is supported by reason and principle. In India, where there is a great deal of waste land, and where

Encroachment by the raiyat for the benefit of the landlord.

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quantities and boundaries are very often ill-defined, there are very strong reasons for the application of such a rule. And the principle upon which the rule is founded is one of general application, namely that if an act is capable of being treated as either rightful or wrongful, it shall be treated as rightful. Now in the case put the act of the tenant in taking possession of more land that was let to him, though it possibly may have been a trespass and wrongful, may in most cases equally well have been done with the assent, express or implied, of the landlord, and so have been rightful, and in the absence of any proof to the contrary it is treated as the latter. We know of no case in which the principle has been expressly recognized by judicial decision in India, but it is in accordance with the principle laid down by section 4 of Regulation XI of 1825 as the increase of land by alluvion. In practice also encroachments made by the tenant are not considered as held by him absolutely for his own benefit against his landlord. If it were so, the tenant would in twelve years necessarily gain an absolute title under the statute of limitations; but we do not know of any case in which a title has been thus established." This decision has been followed in Nudyar Chand *v.* Mian Jan, I. L. R., 10 Cal., 820. The Judges remarked: "This case, therefore, directly raises the question, what the law of this country is with regard to encroachments made by a tenant *upon his landlord's property*. There is no doubt whatever, that by the English law an encroachment made by a tenant upon land adjoining to, or even in the neighbourhood of his holding, is presumed, in the absence of strong evidence to the contrary, to be made for the benefit of the landlord. And this rule applies to all land so encroached upon, whether the landlord has any interest in it or not. If a tenant during his tenancy encroaches upon the land of a third person and holds it with his own tenure until the expiration of the tenancy, he is considered to have made the encroachment, not for his own benefit but for that of his landlord; and if he has acquired a title against a third person by an adverse possession he has acquired it for his landlord and not for himself. This doctrine appears to have been adopted here in the case of Guru Das Roy *v.* Iswar Chandra Bose, as well as in other cases. It is true that by the English law if it could be distinctly proved that the tenant made the encroachment adversely to his landlord, an adverse possession for 12 years might then give the tenant a title by limitation; and probably that would be so in this country. But that was clearly not the case in this instance because the plaintiff himself in his plaint claims the land in question as part of his taluk (under defendant No. 2) * * * *. It would indeed seem strange if, as a matter of law, a tenant were allowed, *without his landlord's permission*, to appropriate any land which adjoins his own tenure, and then, when this landlord complained of the trespass and required him to give the land up, he were allowed to take advantage of his own wrong, and insist upon retaining possession of it, until the expiration of his tenure. In this particular case, however, it was no part of the plaintiff's case that the zemindar, either expressly or impliedly, had consented to the encroachment. His case, in the first instance, was that the land in question formed part of his original taluk. That has been negatived by both the Courts. He then contended that he had held it adversely to his landlord; but that,

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for the reasons already given we have found to be untenable." See also Earl of Lisburne *v.* Davies, L. R., 1 C. P., 259; Whitmore *v.* Humphris, L. R., 7 C. P., Kingsmith *v.* Milliard, 11 Ex. 313; Andrews *v.* Hailes, 2 E. & B., 349; Andrew *v.* Francis, 2 Hay's Reports, 560; Esubai *v.* Damodur, I. L. R., 16 Bom., 556. In the case of Prahlad Teor *v.* Kedar Nath, I. L.R., 25 Cal., 302, it was observed that "when a tenant encroaches upon the land of his landlord, though the landlord may if he chooses, treat him as a tenant in respect of the land encroached upon, the tenant has no right to compel the landlord against his will to accept him as a tenant in respect of that land." But it does not follow that because the landlord has this option he can treat the tenant as a trespasser at any time after having exercised his option in treating him as a tenant for some time.—(Abdul Hamid *v.* Mohini Kant Saha, 4 C. W. N., 508).

Accretions to tenures and holding.

Where land accretes to an under-tenure, the right of occupancy in the land passes to the owner of the under-tenure, and not to the zemindar. The general law upon the subject is contained in clause 1, section 4, Regulation XI, 1825, which is as follows: "When land may be gained by gradual accession, whether from the recess of a river or of the sea, it shall be considered as an increment to the tenure the person to whose land or estate it is thus annexed, whether such land be held immediately from Government by a zemindar, or as a subordinate tenure by any description of under-tenant whatever: provided that the increment of land thus obtained shall not entitle the person in possession of the estate or tenure to which the land may be annexed, to a right of property or permanent interest therein beyond that possessed by him in the estate or tenure to which the land may be annexed; and shall not in any case be understood to exempt the holder of it from the payment to Government of any assessment for the public revenue to which it may be liable under the provisions of Regulation II, 1819, or of any other Regulation in force. Nor, *if annexed to a subordinate tenure* held under a superior landholder, shall the under-tenant, whether a khudkasht raiyat holding a mourasi istemrari tenure at a fixed rate of rent per bigha, or any other description of under-tenant, *liable by this engagements or established usage,* to an increase of rent for the land annexed to his tenure by alluvion, be considered exempt from the payment of any increase of rent to which he may be jointly liable." The accretion will then belong to the holder of the jote to whose tenure it has become attached – (Juggut Chunder *v.* Panioty, 6 W. R., Act X, 48; Atlimoolla *v.* Sheik Saheboollah, 15 W. R., 149). And the jotedar is entitled to hold the accretion on the same principle and under the same legal conditions as he holds the parent estate—(Gobindamani *v.* Dina Bandhu, 15 W. R., 87; Golam Ali *v.* Kali Krishan, 8 C. L. R., 517, *per* Field, J.) The words "justly liable" in section 4, cl. (1) of Regulation XI of 1825 indicate an intention on the part of the Legislature that the rent payable for an alluvial increment shall be settled with reference to the circumstances of each particular case, regard being had to the agreement between the parties in respect of the original tenure, where there is such an agreement, and where there is no such agreement, to any usage proved to be applicable

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to such tenure. When, therefore, a zemindar desires to assess the accretion, he must show that he is entitled to do so either by law, custom or special agreement, and accreted lands, when liable to enhancement at the ordinary neighbouring rates, are entitled to a deduction of ten per cent. for collection charges and 10 per cent. for talukdari profits.—(Juggut Chunder *v.* Panioty, 6 W. R., Act X, 48; Baboo Gopal Lal *v.* Kumar Ali, 6 W. R., Act X, 85; Juggut Chunder *v.* Panioty, 8 W. R., 427; (in review), 9 W. R., 379) And even a tenant-at-will is entitled to occupy an accretion so long as he retains possession of his original holding.—(Bhagbut Prosad *v.* Durga Bijai, 8 B.L.R., 73; 16 W.R., 95.) It will be observed that cl. 1, s. 4, of the Reg. XI of 1825, refers only to under-tenants intermediate between the zemindar and the raiyat, and khudkasht or other raiyats who possess some permanent interest in the land, and not to tenant from year to year.—(Zaheeruddin *v.* Campbell, 4 W. R., 57.) The party to whose lands new formations gradually accrete is entitled to them, though he may not have lost any lands, and though the accretion may have been caused by the washing away of the lands of another person.—(Adoomeah *v.* Shiboo Sundari, 2 W. R., 295.) As long as any portion of the estate is in existence the zemindar is entitled to claim the land accreting to it as forming by law part of that estate.—(Bhoobun Mohan *v.* Watson & Co., Sp. W. R., 64.) A zemindar cannot claim lands as an accretion to his estate, when such lands are capable of being identified as a re-formation of land belonging to another owner upon their original site.—(Lopoz *v.* Madan Mahan, 14 W. R., P. C., 11; Hurshahai Sing *v.* Syud Lootfali 23 W. R., P.C., 8; Ramnath *v.* Chundernarain, 1 Hay, 284; Musst. Imam Bandi *v.* Wajid Ali, 7 W. R., P. C., 67; Nugendrachunder *v.* Bipin Behari, 23 W. R., 110.) Where land has been added to the jote of a tenant by gradual accretion, the landlord is entitled to an increased rent on account of such accretions, on the conditions laid down in Reg. XI of 1825, s. 4, cl. 1.—(Shoroshutti Dassee *v.* Parbutty Dassee, 6 C. L. R., 362; see also Gopi Mahun *v.* Hill, 5 C. L. R., 33.) A suit for enhanced rent will lie for increase of the area of a jote after accretion.—(Hara Sundari *v.* Gopi Sundari, 10 C. L. R., 559; Brojendra Kumar *v.* Upendra Narain I. L. R., 8 Cal., 706; Ram Nidi *v.* Parbati Dasi, I. L. R., 5 Cal., 823.) Where the plaintifl held a jote under the defendants and their co-sharers, and a partition of the of the estate was effected in 1877, and to the defendant was allotted only 15 cottahs out of the plaintiff's jote, the defendants notwithstanding recovered by decree in May 1881 rent for a larger quantity than what the plaintiff held under him; and the plaintiff therefore sued for reduction or rather for apportionment of the rent due to the defendant in September 1881; *held* that the suit was not barred by reason of its having been brought beyond a year from the date of partition, and that the proper period for bringing such a suit was six years.—(Durga Prosad *v.* Ghosita Goria, I. L. R., 11 Cal, 284.) The accretion should be assessed at the same rate as the parent tenure.—(Golam Ali *v.* Kali Krishna, I. L. R., 7 Cal., 479: 8 C. L. R., 517); in this case it was not laid down that there should be an inflexible rule applicable to all cases, but having regard to the particular circumstances of that case, (*i. e.* Golam Ali *v.* Kali Krishna) it

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was thought that the accreted land should bear the same rent as was payable in respect of the land included in the original tenure.—(Chooramonee *v.* Howrah Mills Company, I.L.R., 11 Cal., 696.) Where a mokurari is granted at the full letting value of the land comprised in it, it would be unjust to assess the newly-added land at the rate of the original mokurari, if the accreted lands be of inferior quality; on the other hand if the accreted lands be of superior quality, or if in fixing the mokurari rent a lower standard than the full letting value was adopted in consideration of any bonus paid, it would be unjust to the landlord to fix the rent of the accretion at the rate of rent fixed in respect of the original tenure.—*Ibid.* But in the absence of any special circumstance the rate of rent to be assessed upon the accretion should be in proportion to that paid for the parent tenure.—*Ibid.* An increment is to be regarded as a part of the parent tenure and the landlord cannot treat the increment as a separate tenure altogether, and treating it as a part and parcel of the parent tenure he can claim such relief as under the law he is entitled to obtain as against the tenure-holder.—Assanulla *v.* Mohini Mohan, I. L. R., 26 Cal., 739 (744).

Reformed site.

If there has been a diluvion, and the tenant was paying on for the portion washed away, the re-formation of that portion will not make him subject to enhancement. If, however, after the deluvion he has obtained a reduction of the rent, a re-formation will again subject him to enhancement.—(Compare Hem Nath Dutt *v.* Ashgur Sirdar, I. L. R., 4 Cal., 894.)

Back rent.

There is nothing in the Bengal Tenancy Act to debar the landlord from claiming back-rents for any additional area, if such additional area was in the use and occupation of the tenant.—(Jugernath *v.* Jumnan, I. L. R., 29 Cal., 247; see also Assanulla *v.* Mohini Mohan, I. L. R., 26 Cal., 139.) There is no provision in s. 52 or in any other section as is to be found in s. 154 which prescribes the time from which a decree for enhancement of rent is to operate.—*Ibid.*

Sub-section 1 (b):—Reduction of rent.—This section should be read with s. 178 (3) (*f*). A raiyat whose land has diluviated has three courses open to him: He may either (1) sue under this section for reduction of rent, or (2) he may wait until sued by his landlord, and plead that he is entitled to a certain reduction on account of the diluviated land.—(Mahtab Chand *v.* Chitra Kumar 16 W. R., 207; Ramnarin *v.* Pulin Behari, 62 C. L. R., 5; Dindiyal *v.* Jhukra, 6 W. R., X, 24.)

Suit or set-off.

Where, however, a suit for rent is brought by some of several joint landlords against one of several joint tenants for recovery of the plaintiff's share of the rent, such tenant defendant cannot claim abatement under the provisions of this section. His remedy is to bring a suit for abatement making all the joint landlords and his co-sharers in the tenancy parties.—(Bhupendra Narain Datta *v.* Raman Krishna Datta, I. L. R., 27 Cal., 417; 4 C. W. N., 197. Afsuroobdee *v.* Musst. Shorashi Bala, Marsh., 558); or

Refund.

(3) he may complain of an excessive demand of rent, and sue for a refund of the sum which has been exacted from him. When

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a raiyat had been compelled to pay an excess rent for 1265 of Rs. 99, for 1266 of Rs. 199, for 1267 of Rs. 195, for 1268 of Rs. 1,126, in all Rs. 1,617, and sued the zemidar to recover the excess, it has held that the suit was maintainable: "No doubt" observed the Court, "when a diluvion took place, the plaintiff had a right of suit to obtain an abatement of his jumma, if the zemindar had refused to grant such abatement. But he was not bound to sue for that pupose. He was not actually injured until compelled to pay the rent named in the pottah, without the allowance of the abatement he claimed. Upon that payment having been extorted from him, he had a new right of action.—Barry *v.*.Abdool Ali, Sp. W. R., 64; 2 Board's Rep., 85; Raja Nilmoni Sing *v.* Annoda Prosad, 1 B. L. R., F. B., 97; 10 W.R., F.B., 41.) A plaintiff who has sued for and obtained a decree for an abatement of rent payable in respect of a patni held by him, may afterwards sue for a refund of the rent paid by him before instituting the suit for abatement, in excess of the amount justly payable, notwithstanding that he might, if he had chosen, have included this claim in his suit for abatement of rent—(Okhoy Kumar *v.* Mahtap Chunder, I. L. B., 5 Cal., 24.) In Afsurooddeen *v.* Musst. Shorashi Bala, Marh. 558, a talukdar claimed an abatement of rent on the ground that a portion of his taluk had been washed away by a river; and the question arose whether he was entitled to claim a diminution of rent on this account. The Court held that he was so entitled, *unless there was an express stipulation that he should pay, whether the land was washed away or not.* "If a man," observed the Chief Justice, "stipulates to pay rent, it is clear he engages to pay it as a compensation for the use of the land rented, and independently of section 18, Act X of 1859. We are of opinion that, according to the ordinary rules of law if a talukdar agrees to pay a certain amount of rent, the tenant is exempt from the payment of the whole rent if the whole of the land be washed away. According to English law a tenant is entitled to abatement in proportion to the quantity of land washed away, and he is entitled to that abatement in suit brought by the landlord for arrears of rent." This question was further discussed in a subsequent case, in which the tenant claimed an abatement, upon the ground that par of his land has been washed away, and that a part of it had been covered with sand. "We think," observed the Chief Justice, "upon principles of natural justice and equity, that, if a landlord lets his land at a certain rent, to be paid during the period of occupation, and the land is, by the act of God, put in such a state that the tenant cannot enjoy, the tenant is entitled to an abatement. The first question then is, whether there was any stipulation in the kabuliyat, which precluded the tenant from claiming an abatement, if, by act of God, any portion of his land was washed away? If it is found that, according to an express stipulation in the kabuliyat the tenant is not entitled to any abatement by reason of any part of the land being washed away by the act of God, then the tenant is not entitled to abatement during the term of that lease. But it is said the lease is at an end; but we think then, when a tenant holds on after the expiration of the lease, he does so on the terms of the lease, at the same rent and upon the same stipulation as are mentioned in the lease, until the parties come to a

Refund.

Abatement of rent must follow a damage caused to the land demised by the act of God.

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fresh settlement.'—(Sheik Ennyet Ulla *v.* Sheik Elahee Buksh, Sp. W. R., Act X, 42; 2 Board's Rep., 62. *Quare.*—Ram Churn *v.* Lucas, 16 W. R., 279.) Under s. 178 (3) (*f*) even a contract will not take away the right of the raiyat for reduction of rent. Where a raiyat instead of suing for abatement waits until an action for arrears of rent has been brought against him by his landlord, and then claims a reduction on the ground of diluvion, the whole *onus* lies upon him of proving the extent of the deduction to which he is entitled, and of showing precisely what lands have disappeared. The zemindar in proving that full rent has always been paid has proved a sufficient *prima facie* case, which it is for the tenant to rebut.—(Savi *v.* Obhoy Nath, 2 W. R., Act X, 28.) A tenant is, however, entitled to abatement when the area of his holding has been reduced, not only by diluvion, but by other causes also. Thus when a portion of a raiyat's land has been taken up by Government for a road, it was held that he was entitled to a deduction of rent from the zemindar for the land taken from him.—(Deen Doyal *v.* Musst. Thakroo, 6 W. R., Act X, 24; Maharaja Dheraj Mahtab Chand *v.* Chitra Kumari, 16 W. R., 201.) For remission on account of diluvion or washing away, see Krista Sunder *v.* Chunder Nath, 15 W. R., 230; or on account of land taken by Government for Railway purposes, see Mohes Chunder *v.* Gunga Moni, 2 Hay, 495; Gordon Stuart & Co. *v.* Maharajah Mahtab Chand *id.*, 565; Prosunno Mayi *v.* Sundar Kumari, 2 W. R., Act X, 30; Maharajah Mahtab Chand *v.* Chitra Kumari, 16 W. R., 201; or in respect of lands resumed as chakran by Government. —(Huro Kishen *v.* Joy Kishen, 1 W. R., 299.) A landlord claiming remission from Government on account of damage done to his estate by a cyclone is not on that account bound to allow a remission to his under tenants unless he got the remission on the understanding or agreement that he was in his turn to grant remission to his under-tenants.—(Goluk Chunder *v.* Parbuti Churn 15 W. R., 168.) Where the jumma of a resumed lakheraj estate had been reduced by Government on the condition that the rents of the raiyats should be reduced in the same proportion, it was held that the raiyats were entitled to the benefit of the stipulation made by Government on their behalf at the time when the jumma was reduced.—(1 Ind. Jur., 7; Sukhawutalluh *v.* Puthu Goldar; *contra* Oomanunda Roy *v.* Sree Kanta, 21 W. R., 108.) In a suit for rent by a zemindar against a patnidar, the latter claimed abatement of the rent on the gronnd that part of the land included in the patni tenure had been acquired by the Government for public purposes. The kabuliyat executed by the patnidar contained a provision to the effect that, if any of the land settled should be taken up by Government for public purposes, the zemindar and patnidar should divide and take in equal shares the compensation-money, and a further provision to the effect that the patnidar should make no objection on the score of diluvion or other causes to pay the rent fixed or reserved by this kabuliyat. *Held* that the patnidar was entitled to abatement of the rent.—(Uma Sankur *v.* Tarini Chunder, I. L. R., 9 Cal., 571.) In this case Field, J., in construing the clause in the stipulation,

Land acquired for public purpose.

Agreement against abatement of putni rent.

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observed: "It appears to me that the taking of land by Government for a public purpose is not a cause of the same nature as diluvion, and for this reason: When land is washed away by action of the river, the thing itself out of which the rent issues is destroyed, certainly for a time, although it is quite possible that by action of the same river there may be a re-formation. But in the case of re-formation the custom of the country is that, where an abatement has been allowed for diluvion, enhancement is claimable for alluvion. When land is taken up by Government, the thing itself out of which the rent issues is not destroyed; it continues to exist, and the Government pays what must be taken to be the market value of the land at the particular time. It therefore appears to me that it is impossible to say that ths taking of land by Government for public purposes is a case *ejusdem generis* (of the same kind) with diluvion." Norris, J., remarked: "In construing this document it cannot reasonably be held that the taking of part of the land by the Government for the purposes of a railway is *ejusdem generis* with land abating or increasing by reason of diluvion and alluvion, or in other words, by the act of God; and I am strengthened in coming to this conclusion when it is manifest that there was present before the minds of the parties at the time the patni settlement was granted by the plaintiff, the fact that the Government was likely to take a portion of the land included in the settlement for the purposes of railway; and if the parties intended that there should be no abatement of rent when Government exercises their powers, in addition to making an express provision for the distribution of the compensation-money, they would have further stated that there would be no abatement of rent." An ijaradar took on lease certain lands, giving a kabuliyat which contained the following clause: "In regard to the aforesaid rent we take upon ourselves the risk of flood and drought, of death and flight, of alluvion and diluvion, of profit and loss. In no case shall we be able to claim a reduction in the rent, nor will it be open to you to demand more on account of alluvion, &c." During the lease, parts of these lands were taken up by Government for the purpose of a railway, and compensation was paid to the lessor therefore. The ijaradar claimed to make a deduction from his rent for the land taken away from him. *Held*, that such a claim did not come under the meaning of the word "abatement" as used in the Rent Law, nor was it intended by the parties to to be within the clause of the lease, but the land having been taken from the whole area demised, not by natural causes, but by *vis major*, the ijaradar was entitled to a deduction from the rent on his showing that there were tenants of his on the land, who before the land was taken by Government, paid rent to him, which they had now ceased to pay.—(Watson and Co *v.* Nistarini, I. L. R., 10 Cal., 544.) "We think," says Mr. Field in this case, "that it is not properly a case of abatement, at the term is ordinarily used in the Rent Law. It is a case in which the tenant seeks to have a deduction in respect of land taken away from the whole area demised, not by natural causes but by *vis major*. In this view we think that the ijaradar is entitled to a deduction." Portion of certain land held under a patni having been taken up by the Government for public purposes under the Land Acquisition Act, the zemindar

Vis major.

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declared his intention of granting no abatement of rent, and acting upon this declaration the patnidar was allowed to appropriate the whole of the compensation. The patni was subsequently sold under Reg. VIII of 1819, with notice of the amount of the original rent, and the purchaser now sued for abatement of that rent. He did not allege that he had no notice of the proceedings under the Land Acquisition Act—*held*, that the plaintiff must be presumed to have had notice of these proceedings, and that it was therefore incumbent upon him to have made enquiry regarding the position of the patni, and that under the circumstances he was not entitled to the abatement sought for—(Pearymohun *v.* Aftab Chand, 10 C.L.R., 526.) A putnidar may also claim abatement upon such ground as the land is absolutely lost to the putnidar, and he is also entitled to some share of the compensation money:—(Bhowani Nath Chuckerbutty *v.* Land Acquisition Deputy Collector of Bogra and another: 7 C. W. N., 130.)

Agreement against abatement.

In Satyendranath Thakur *v.* Nilkantha, I. L. R., 21 Cal., 383, in which a tenant was sued for arrears of rent of his jote, and compromised the case by executing a solehnama agreeing to pay rent at 13 ans. per bigha or Rs. 4,300 bighas, and that no remission of rent should be claimed on any account whatever, and in which, the jote being subsequently sold in execution of a decree passed on the basis of the solehnama, the landlord sued the purchaser for arrears at the rate specified in the solehnama, it was held that the compromise was a valid and binding transaction, and, that being so, the purchaser was bound by it. The provisions of sec. 178 (3) (*f*) were not referred to in this case.

Remission of rent on other grounds.

A suit by a tenant for declaration that he is no longer liable to pay the whole amount of rent on the ground that a third party has established his right to a share of the rent, is not a suit for abatement of the rent payable for the plaintiff's land.—Chand moni *v.* Lokenath, 6 C. L. R., 494.) Where, under such circumstances, the tenan is holding more land than is covered by his lease, it is not necessary that the landlord should be refered to a separate suit if he is desirous of enhancing the rent.—*Ibid.* When a tenant was obliged to bring a suit to obtain possession and succeeded in obtaining only a part of what was granted in mokurari, *held* that there was the same equity for an apportionment as in a case of eviction.—(Imambandi *v.* Kamleswari, I.L.R., 21 Cal., 1005 (P.C.) A patnidar can sue his zemindar for abatement of the patni rent on the ground that the assets of the patni fell short of the amount stated in the lease, although such a suit is not a suit for abatement of rent within the meaning of Act X of 1859.—(Rajah Nilmony *v.* Unnoda Persad, 10 W. R., F. B., 41; Rajah Nilmony *v.* Sharooda Persad, 18 W. R., 434.) A suit for abatement of rent by a patnidar on the ground of fraud caused by the concealment from him of the existence of intermediate tenure created by the zemindar, is maintainable under the Rent Law, though not under s. 19.—(Shokoor Ali *v.* Urnola Ahalya, 8 W. R., 504.)

Dispossession through defect of lessor's title.

Where a tenant, after obtaining a lease for a certain quantitly of land, was evicted from a portion of it, owing to the defective title of his lessor, it was held that he was entitled to an abatement of rent. "When a landlord," observed the Court, "leases any

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portion of land without any further stipulation with regard to the title, he does thereby impliedly undertake that he has sufficient title to support the lease, and he guarantees the tenant quiet possession and enjoyment. This is the result of the law of England, and we believe that it has always been held to be the same here."—(Brojo Nath *v.* Heera Lal, 1 B. L. R., A. C., 87; 10 W. R., 120.) When once it is determined that a tenant is entitled to an abatement of rent, in consequence of the subject of the demise having been diminished, the only thing that requires to be settled is, what was the portion of the original rent which was referable to the portion of the tenure which has disappeared. If there is nothing in the pottah to show that the rent was apportioned in parcels to the different parts of the whole land, the only way to arrive at a conclusion as to how much of the whole rent is fairly attributable to this particular portion is to deal with it as a matter of proportion, *i.e.*, such a sum ought to be deducted from the whole rent as would bear to that whole rent the same proportion as the annual value of the portion of the land that has disappeared bears to the annual value of the land originally leased.—*Ib.*, 121. The right of a landlord to receive rent from a tenant depends upon his securing to the latter quiet possession of the property leased. —(Kristo Sunder *v.* Chunder Nath, 15 W. R., 230.) If the tenant be evicted from land demised, or they be recovered by a title paramount, the lessee is discharged from the payment of the rent from the time of such eviction, and if he is evicted from part, the rent is to be diminished in proportion to the land from which he is evicted.—Gopanund *v.* Lalla Gobind, 12 W. R., 109.)

Reduction for less area than mentioned in the lease.

But the plea of the quantity of land being less or greater than that mentioned in the pottah cannot avail the tenant or the zemindar if he had known the land itself—the subject of the lease.—(Tripp *v.* Kalidas Mukerji, Sp. W. R., Act X, 122.) The mere fact of his having been in possession of less land than that mentioned in his pottah will not entitle the tenant to a reduction of rent.—(Sitanath Bose *v.* Shamchand Mitter, 17 W. R., 418.) A suit by a tenant against his original lessors for a declaration that he is not liable to pay them the whole rent payable under his pottah in consequence of a third person having, subsequent to the grant of such pottah, by suit established a right to a share of the rent, is not a suit for abatement under Act VIII of 1869 (B.C.), and therefore not subject to the rule of limitation prescribed by s. 27 of the Act. Where under such circumstances, the tenant is holding more land than is covered by his pottah, it is not necessary that his landlord, if desirous of enhancing the rent, should be referred to a separate suit for that purpose. The suit of the tenant being for equitable relief, the claim of the landlords must be taken into consideration in determining what relief the plaintiff is entitled to obtain.—(Chand Moni *v.* Lokenath, 6 C. L. R., 494.)

Res-Judicata:—A claim for rent being a recurring cause of action, a tenant is entitled to set up against it for any particular year any right which he had to a deduction or abatement, notwithstanding that he has paid full rent for several previous years.—(Maharajah Mahtab Chand *v.* Chitra Kumari, 16 W. R., 201; Gour Kishore *v.* Bonomali, 22 W. R., 117.) Each year's rent is in itself a separate and entire cause

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of action and the mere failure of a tenant to prove in a previous suit for rent that he was entitled to an abatement does not prevent him from proving the same in a subsequent suit brought for recovery of rent for a different period.—(Nilmadhub *v.* Brojonath I.L.R., 21 Cal., 240; Raghoonath *v.* Juggut Bundhoo, I.L.R., 7 Cal., 214. But where in a suit for rent the issue was as to whether the rent claimed was payable in respect to the quantity as alleged by the landlord or a much larger quantity as alleged by the tenant and it was decided in favour of the landlord, *held* that a subsequent suit by the tenant for a declaration that the rent was payable for the larger area as claimed by him was barred by the rule of *resjudicata*.—Bussun Lall *v.* Chundee, I.L.R., 4 Cal., 686; see also Nobodurga *v.* Foyzbux, I. L. R., 1 Cal., 202; 24 W. R., 403.

Sub-section (2) (b) & (c):—" Payment of the full rent, year by year, more than 30 years after the lands are said to have been washed away, would be strong evidence that no such claim was in the contemplation of the parties when the contract was originally made."—(Ram Churun *v.* Lucas, 16 W. R., 279; see also Ram Narain *v.* Poolin Behari, 2 C. L. R., 5.) See notes under sub-s. (1). The defendant having for more than sixty years occupied lands in excess of the number of bighas specified in his pottah, and the lands in question having always been deemed to form part of what was covered by the pottah, it was held that they had been occupied and enjoyed as the land included in the pottah since before the Decennial Settlement, and that the rent therefore could not be enhanced.—(Jannaki Ballabh Chakravarti *v.* Nabin Chandra Rai, 2 W. R., Act X, 33; Indra Bhushan Deb *v.* Golak Chandra Chakravarti, 12 W. R., 350; Farquharson *v.* Government of Bengal, 16 W. R., P. C., 29).

Sub-section (2) (d) :—In this, the Legislature seems to have overruled the decision of Baban Mundul *v.* Sheeb Kumari, 21 W.R., 404, where it was held that s. 19 referred to an alteration of area owing to a portion of the land having gone away by diluvion or otherwise, and not to some difference in the length of the measuring pole in use at different periods.—See Jugut Chunder *v.* Panioty, 8 W. R., 427; Ram Narain *v.* Poolin Behari, 2 C. L. R., 5; Prosunnomoyi *v.* Doyamoyi, 22 W. R., 275; Nobin Chandra *v.* Gour Chundra, 8 C. L. R., 161.

Sub-section (3).—It should be remarked that though in fixing the reduced rent considerations should be made of the surrounding rates, yet the low rates of the neighbourhood is no ground for making the reduction.—(Baban Mundul *v.* Sheeb Kumari, 21 W. R., 404).

Profits of the tenure-holder. See s. 7 and notes *ante*.

Similar rates of the vicinity. The old law laid down that the additional rent should be at a rate in proportion to that paid for the parent tenancy.—(Gopal Lal *v.* Kunar Ali, 6 W.R., Act X, 85; Nistarini Dasi *v.* Bonomali, I. L. R., 4 Cal., 941; Golam Ali *v.* Kali Krishna, I. L. R., 7 Cal., 479; Laidley *v.* Bisnu Charan, I. L. R., 11 Cal., 553). But this rule is not meant to be inflexible—(Churamani *v.* Howrah Mills Company I. L. R., 11 Cal., 696).

Sub-section (4).—The rule prescribed in this sub-section is the same as that laid down in Brajanath Pal *v.* Hira Lal Pal, (1 B. L. R., A. C., 87; 10 W. R., 120).

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Sub-section (5).—This sub-section was added by the Bengal Tenancy Amendment Act III, B. C., of 1898. In the Statement of Objects and Reasons the reasons for the addition were explained thus.—"It has been held by some Special Judges, interpreting a decision of the High Court (1) that when additional rent is claimed on the ground of excess area, the landlord must indicate the precise plots or pieces of land acquired by the tenant in excess of the original holding, while section 52 itself does not provide for the assessment to rent of excess lands, where there are no rates for lands of a similar description in the vicinity but lump rentals. The section, as amended, indicates that it should not be always necessary, in order to prove excess area, to point out the particular plots that were acquired since the original letting, and provides a rule for assessment of such excess areas, when proved. When the original letting was at so much a bigha, and it is shown by measurement by the same standard and under the same conditions that the tenat is holding a larger number of bighas than he is paying rent for, it should not be necessary for the landlord to point out the particular plots which the tenant has acquired in excess of the original area comprised in his holding".

Limitation:—The right to recover additional rent for increased area is a recurring one and a landlord is not entitled to exercise it whenever he finds it necessary to do so.(—Jotindra Mohan *v.* Chandra Nath, 6 C. W. N., 260.) A landlord brought a suit in an alternative form asking either for khas possession of the excess land or for a declaratory decree assessing the rent thereon in the terms of the kabuliyat; he ultimately failed in his prayer for direct possession but succeeded in getting a declaratory decree; he broughr a suit for rent alleging that his cause of action accrued by virtue of the decree; *held*, that this was not so and that the cause of action accrued on the last day of the year on which the rent fell due.—(Hurro Kumar *v.* Kali Krishna, I.L.R., 17 Cal., 251; see also Dayamoyee *v.* Bholanath, 6 W.R., Act X, 77; Huro Pershad *v.* Gopal Das, I.L.R., 9 Cal., 255; Sheriff *v.* Dinanath, I.L.R., 12 Cal., 258.) A tenant is also entitled to claim an abatement of rent although he has paid full rent for several years:—Mahtab Chand *v.* Chittra Coomaree, 16 W. R., 201. Plaintiffs (patnidars) sued the defendants (durpatnidars) for arrears of rent. The defendants alleged that a part of the land had been taken by the Government twenty-four years previously, for the purposes of a railway, and they claimed an abatement on that ground: *Held* that the Limitation Act does not in terms prevent a defendant from setting up such a defence; but that the great delay in this case, combined with other circumstances, disentitled the defendants, to any relief in a Court of Equity—(Ramnarain *v.* Poolin Bihari, 2 C. L. R., 5.)

Court fees:—Under sec. 7, sub-sec. 11, Act VII of 1870, in a suit (1) to enhance the rent of a raiyat having a right of occupancy, (2) for abatement of rent, the amount of fee payable under Act shall be computed according to the amount of the rent of the land to which the suit refers, payable for the year next before the date of presenting the plaint.

Board of Revenue's instructions:—The Board of Revenue has laid down the following instructions for the guidance of Revenue-officers in assessing additional rent for excess area and in decreasing rent for diminution of area.—(Survey & Settlement Manual, Part III, Chapter. VI, p. 90).

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The Revenue-officer has to consider what the old area was; what the present area is; how much, if any, of the difference represents a real excess or deficit, after making allowance for different standards and systems of measurement; and what rate should be applied to the excess or deficit. His inquiries should take the following order:—

(1) Whether there is any proof or admission of encroachment or loss as regards any particular field or fields.

(2) Whether there is any positive proof or admission of a previous measurement; and, if so, how it was made, and by what standard.

(3) Whether, in the absence of any positive proof of previous measurement, there is sufficient indirect evidence to show that there was such a measurement, *e.g.*, the custom of measurement before settlement; and, if so, by what standard it was probably made.

In making these inquiries, the Revenue-officer may find it useful to collect a number of cases in which he can identify a field or holding now held with a field or holding formerly recorded, or in which he can obtain the recorded area of a field or holding known to have been unchanged in shape and size, or presumed to be so from its being situated near the homestead or in the centre of cultivation, and a similar list of fields or holdings situated at the edge of the village or near existing waste lands, where it may be reasonable to suppose that former waste has been encroached on. The totals of two such lists will give him some reasonable ground for a conclusion as to whether there was a considerable or constant error in the old recorded areas, and if any allowance should be made for such error. It would be well also to consider what allowance should be made for error in old recorded areas, whether because of difference between the old system of measurement and that now adopted, or because of the exclusion of *ails* or partitions between the fields in the old measurement and the inclusion of them in the new, or for other reasons.

From these materials the Revenue-officer will be able to decide what is the difference between the present and past measurements in respect of (*a*) system of measurement, and (*b*) standard adopted. On the other hand, if the Revenue-officer finds that the original areas were entered only by guess, it will not be advisable to adopt this method for settling fair rents.

(4) The Revenue-officer should next consider the amount of the difference between the present and the former recorded area, and what amount should be considered assessable excess.

(5) Then he should consider the rate for assessing such excess area. The village rate, or the rate for that particular class of land, may be considered; and, under subsection 5 of section 52 of the Act the previous average rate of rent of the holding may be applied. In the case of privileged tenants the excess may often be assessed at privileged rates.

(6) The actual additional rent has then to be calculated; and this, added to the present rent, gives the new fair rent. Similar calculations will give the amount of rent to be deducted to make a fair rent in the case of a deficit of area.

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Payment of rent.

53. Subject to agreement or established usage, a money-rent payable by a tenant shall be paid in four equal instalments falling due on the last day of each quarter of the agricultural year.

Payment of rent. Instalments of rent.

Subject to agreement:—This section applies where instalments are not fixed by special agreements; and section 178 of the Act does not interfere with such contract. Where by an agreement the defendant was to pay Government revenue through the plaintiff, *held* that he was liable to pay the Government revenue as it fell due and the rule which prevailed in the locality for the payment of instalments of rent by ordinary tenants was not at all applicable to the defendant.—(Giridhari *v.* The Court of Wards, 10 W. R., 368. Where in a kabuliyat it was provided that rent was to be paid in monthly instalments the mere fact that the payment of the rent had not been enforced (by not taking the rents in monthly instalments) did not take away from the landlord the right to enforce it whenever the tenant fell into arrear.—(Pearee Mohun *v.* Brojo Mohun, 21 W. R., 36: Pearee Mohun *v.* Brojo Mohun, 22 W. R., 428.)

Contract instalments.

Established usage:—Means the established usage in the pergunnah, not the established usage between the parties.—(Chytunno Chunder *v.* Kedernath, 14 W. R., 99.) The words "established use" in s. 53 of the Bengal Tenancy Act, 1885, do not refer to a practice previously prevailing between the landlord and his tenant, but to the established usage of the pergunnah in which the holding is situate.—(Hiralal Das *v.* Mothura Mohun Roy Chowdhuri, I. L. R., 15 Cal., 714.) The established usage of the locality, and not the usage between the parties, is that contemplated by s. 53 of the Bengal Tenancy Act.—(Hira Lal Das *v.* Mothura Mohun Roy, I. L. R., 15 Cal., 714, followed; Watson & Company *v.* Sreekristo Bhumic, I. L. R., 21 21 Cal., 132.)

Money-rent:—This section provides for instalments of money-rent only; produce-rents are payable when the produce is gathered, or as agreed upon between the parties, or where there is no such agreement according to the custom of the country. The word "rent" in ss. 53 to 68 also includes money recoverable under any enactment for the time being in force as if it was rent. See s. 3, sub.-sec. (5) *ante*, pp. 12, 18 and 24. The sums recoverable as rent mentioned in the notes to section 3 (5) on pages 12, 18 and 24 *ante*, are payable in the same instalments as rent, except where otherwise provided by contract or usage.

Liability of an auction purchaser:—Since rent is regarded as not accruing from day to day, but as falling due only at stated times according to the contract of tenancy, or in the absence of a contract, according to the general law laid down in this section (53), an auction-purchaser of a tenure or holding in respect of which

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rent is claimed is liable for the whole of the instalment which accrues due after the date of his purchase, though he may not have been in possession for the whole period in respect of which the instalment is due, although as a matter of fact his title becomes perfected only on the date of confirmation of the sale under section 314 of the Code of Civil Procedure.—(Satyendro Nath *v.* Nil Kantha, I. L. R., 21 Cal., 385. The purchaser can, it was said, always protect himself by paying for the property only its value, regard being had to the liability with which it is burdened. But when a landlord brings a tenure to sale in execution of a decree for arrears of rent, the purchaser becomes his tenant only from the date of confirmation of sale, and the former tenant is liable for the arrears accruing between the date of sale and confirmation.—(Karunamay *v.* Surendra, 2 C. W. N., cccxxvii.

Time and place for payment of rent.

54. (1) Every tenant shall pay each instalment of rent before sunset of the day on which it falls due.

(2) The payment shall, except in cases where a tenant is allowed under this Act to deposit his rent, be made at the landlord's village-office, or at such other convenient place as may be appointed in that behalf by the landlord:

Provided that the Local Government may, from time to time, make rules, either generally or for any specified local area, authorizing a tenant to pay his rent by postal money-order.

(3) Any instalment or part of an instalment of rent not duly paid at or before the time when it falls due shall be deemed an arrear.

Sub-section (1):—Section 50 of the Indian contract Act provides: "The performance of any promise may be made in any manner, or at any time which the promisee prescribes or sanctions. *Illustrations*:—

"(*a*). B owes A Rs. 2,000. A desires B to pay the amount to A's account with C a banker. B, who also banks with C, orders the amount to be transferred from his account to A's credit, and this is done by C. Afterwards, and before A knew of the transfer, C fails. There has been a good payment by B.

"(*b*). A and B are mutually indebted. A and B settle an account by setting off one item against another, and B pays A the balance found to be due from him upon such settlement. This amounts to a payment by A and B respectively of the sums which they owed to each other.

"(*c*). A owes B Rs. 2,000. B accepts some of A's goods in reduction of the debt. The delivery of the goods operate as a part payment.

"(*d*). A desires B, who owes him Rs. 100, to send him a note for Rs. 100 by post. The debt is discharged as soon as B puts into the post a letter containing the note duly addressed to A." These illustrations indicate 4 different ways in which a debt may be paid. Another (5) common mode of payment is, when the creditor de-

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sires the debtor to pay the money to some third person, as by atornment or apportionment. A payment by a tenant under the landlord's directions to another or for a specified purpose, is tantamount to a payment to the landlord himself, and is a sufficient answer to the landlord's suit for rent—(Musst. Joykoer *v.* Furlong, Sp. W. R., Act X, 112; 3 R. J. P. J., 101; compare Kristo Dhun *v.* Mahomed Nukee, 10 W. R., 495); similarly a payment of Government revenue by the tenant must be treated as a payment on account of rent—(Hill *v.* Wooma Moyee, 15 W. R., 545). Where a tenant has paid rent to two proprietors jointly, payment to one is a sufficient defence in a suit by the other, unless he has had notice of separation—(3 R. J. P. J., 137.) A payment of rent to one of several joint proprietors is a payment to all—(Oodit Narain *v.* Hudson, 2 W. R., Act X, 15; Mookta Keshi *v.* Koylash Chunder, 7 W. R., 493). An auction-purchaser, with a notice of a payment in advance, made by the tenant to the former proprietors of rent due for a period subsequent to the date of purchase, is bound by such payment—(Ram Lall *v.* Rao Joggendra Narain, 18 W. R., 328; Madun Mohan *v.* Holloway, I. L. R., 12 Cal., 555.) Another (6) mode of payment is, when the debtor agrees to give a promissory note or to accept a bill for the amount, and a 7th mode of payment is by money order as in proviso to clause (2) of this section. Illustration (*a*) is an instance of payment to an agent; but payment to an agent, who is, to the payer's knowledge, not authorized to receive it, is not equivalent to payment to the principal—(Mackenzie, Lyall *v.* Shib Chunder, 12 B. L. R., 360.) As to illustration (*b*), set off can, of course, be pleaded in an action for the debt without showing any consent on the part of the plaintiff. See Civil Procedure Code, section 3.

Shall pay.

Before sunset:—Under the old law it was held by a Full Bench that rent becomes due "at the last moment of the time which is allowed to the tenant for payment."—Kashi Kant *v.* Rohini Kant, I. L. R., 6 Cal., 325, over-ruling Woomesh Chunder *v.* Surja Kant, I. L. R., 5 Cal., 713. According to English law, rent is not due till midnight of the day specified in the lease for payment, but where it is necessary to demand or tender rent in order to eject or prevent a forfeiture, such demand or tender must be before sunset. The common law distinguishes between cases where the thing is to be done *anywhere*, and those where it is to be done at a *particular place*. In the former case a tender at a convenient time before midnight is sufficient; in the latter it must be before sunset, because it is the duty of the promisee to attend—(Coke on Littleton, 202*a*; Startup *v.* MacDonald, 6 Manning and Granger's Reports, C. P., 593). Under section 47 of the Contract Act, the tender must, under any circumstances, be during the usual business hours. This section, however, provides that the tender must be made before sunset, and read with section 47 of the Contract Act, it would mean that the tender must not only be before sunset, but also during the usual hours of business.

The time of payment.

Sub-section (2): Village-office:—"The place where the promise ought to be performed" is fixed by clause (2) to be the landlord's village-office, or at such other convenient place as the landlord

The place of payment.

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may appoint. The word "convenient" implies that it does not lie entirely within the power of the landlord to appoint arbitrarily any unreasonable place. Section 49 of the Contract Act has "a reasonable place." The rule is thus stated in Coke's Littleton, 210*b*: "If the condition of a bond or a *feoffment* be to deliver twenty quarters of wheat or twenty loads of timber or such like, the obligor or feoffer is not bound to carry the same about and seek the feoffee, but the obligor or feoffer before the day must go to the feoffee and know where he will appoint to receive it, and there it must be delivered." This is qualified by section 49 of the Contract Act by the duty imposed on the promisee of appointing "a reasonable place." It is for a debtor to pay his debts due at a fixed time; and when a debtor pleads tender of payment as a ground for not being saddled with interest, it is for him to prove such tender.—(Sarat Sundari Debi *v.* The Collector of Mymensingh, 5 W. R., Act X, 69). A tenant's liability to pay rent remains notwithstanding that the landlord has no village-office and that he has not appointed a convenient place for payment; where there is no controlling agreement the tenant must go to his landlord and pay the rent as it falls due:—Fakir Lal *v.* W. C. Bonnerjee, 4 C. W. N., 324.

Sub-section (2): Proviso:—The Local Government has in a Resolution dated 19th March, 1891, published in the *Calcutta Gazette* of the 25th *idem*, Part I, page 287, authorised tenants to pay their rents by money-order, in all districts in which the present Act is in force. Sums recoverable as rent may also be paid in the same way.

Sub-section (3): Arrear:—Section 21 of Act VIII of 1869 (B. C.), and section 20 of Act X of 1859, ran as follows: "Any instalment of rent which is not paid on or before the day when the same is payable according to the pottah or engagement, or if there be no written specification of the time of the payment, at or before the time when such instalment is payable according to established usage, shall be held to be an arrerar of rent under this Act. Under the old sections in Woomesh Chunder *v.* Soorja Kanta, I. L, R., 5 Cal., 713, the Court held that the arrear of rent of any year cannot be due except on the first day of the year following. This decision was, however, overruled by a Full Bench in the case of Kasheekanta *v.* Rohinikant, I. L. R., 6 Cal., 325, in which the learned Chief Justice (Sir R. Garth) remarked; "'We do not quite understand the reasons upon which the case of Woomesh Chunder *v.* Soorja Kanta, proceeded. It seems to have been considered by the learned Judges in that case, that an arrear of rent does not become due untill the day after that on which by the terms of the holding the rent is payable. But this, we think, is a fallacy. The rent becomes due at the last moment of the time which is allowed to the tenant for payment. If it is not paid within that time, it becomes an arrear and continues an arrear until it is paid. The word 'arrear' in section 29 of the Rent Act (VIII of 1869 B. C.) means 'rent in arrear'; and rent in arrear would undoubtedly become due on the last day of the year in which it is payable."

A produce-rent which is not paid when due is an arrear.—Krishna Bandhu Bhattacharji *v.* Rotish Sheik, 25 W. R., 307. A suit for produce-rent or its money-value is a suit for rent under the Bengal Tenancy Act and not a suit for damages for breach of contract, and, therefore, is not cognizable by a Provincial Small cause Court.—(Shoma Mehta *v.* Rajani Biswas 1 C. W. N., 55.) An arrear of rent due in

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respect of a property sought to be sold in execution of a decree is to be regarded as one of the matters to be notified as being material for the purchaser to know in order to judge of the nature and value of the property, and the omission of the decree-holder to notify such arrear due to him at the date of the issue of the proclamation for the sale of the property has the effect of destroying the lien he has upon the property. —Giribala *v.* Rani Mina, 4 C. W. N., 497 ; see also Rajnarain *v.* Panchanand, 7 C.W. N., xl. Under sec. 67 an arrear of rent shall bear simple interest at the rate of 12 p. c. per annum from the expiration of the quarter in which the instalment falls due, and under sec. 147, suits for arrears of rent cannot be brought more frequently than at intervals of three months.

Appropriation of payment.

55. (1) When a tenant makes a payment on account of rent, he may declare the year or the year and instalment to which he wishes the payment to be credited, and the payment shall be credited accordingly.

(2) If he does not make any such declaration, the payment may be credited to the account of such year and instalment as the landlord thinks fit.

Extended to Orissa, (Not., Sept., 10th, 1891).

Appropriation:—The following sections of the Indian Contract Act should be read with this section:—

"59. Where a debtor owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly. *Illustrations* :—

"(*a.*) A owes B, among other debts, Rs. 1,000 upon a promissory note, which falls due on the 18th June. He owes B no other debt of that amount. On the 1st June A pays to B Rs. 1,000. The payment is to be applied to the discharge of the promissory note.

"(*b.*) A owes to B, among other debts, the sum of Rs. 567. B writes to A and demands payment of this sum. A sends to B Rs. 567. This payment is to be applied to the discharge of the debt of which B had demanded payment.

"60. Where the debtor has omitted to intimate, and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.

"61. Where neither party makes an appropriation, the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionately."

The word "declare" in this section must be construed as *declare expressly or impliedly*. The intention of the debtor may be indicated by the circumstances under

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which the payment is made, and the illustrations of section 59 of the Contract Act give two such instances. This right of the debtor cannot be affected by any refusal of the creditor to apply the payment according to the expressed will of the payer. If the creditor does not choose so to apply, he must refuse it and enforce his rights as the law allows him. Where a debtor owed two debts, one actually due, the other not yet due, but the latter was guaranteed by the debtor's father-in-law, and it was shown that discount was allowed by the creditor on a payment made, it was held that these facts sufficiently established the debtor's intention to appropriate the payment to the guaranteed debt—(Marryatts *v.* White, 2 Stark, 101). The mere fact, however, of one debt being guaranteed, and another not, raises no presumption that a payment is made in respect of the guaranteed debt—(Plomer *v.* Long, 1 Stark, 153). A general payment made by one who is indebted in his own right and also in another right, as executor, for instance, is taken to be made in discharge of the debt due in his own right—(Goddard *v.* Cox, 2 Str. 1194.) If there has been no express or implied declaration of the debtor's intention, the creditor has the right of appropriating payment. But when money, belonging to the debtor, comes into the creditor's hands without the debtor's knowledge, the debtor's right of apportionment remains until he has had an opportunity of exercising it—(Waller *v.* Lacey, 1 M. and G., 54). The payment can be appropriated only to a "lawful debt actually due and payable," by the debtor. A payment could not, therefore, be appropriated to a debt not yet due, or which arose out of a contract illegal or otherwise void. When neither the creditor nor the debtor has exercised his right of appropriation, the payment is appropriated to the earlier debt, that is to say, the first item on the debit side is to be discharged by the first item on the credit side. A payment made without specification of account may be applied to the payment of any debt between the parties—(Shumbho Chunder *v.* Baroda Sundari, 5 W. R., 45; R. J. P. J., 162). A general payment made in one year, without proof that it was in satisfaction of the rents of that year, may be applied in satisfaction of the arrears of the previous years—(Ahmutty *v.* Brodie, Sp. W. R., Act X, 15). A payment for rent should be credited to the oldest rents first and not to current rents, unless so specifically stated by the party making it—(Ranee Surnomayi *v.* Singhooroof, Sp. W. R., Act X, 134). If a raiyat shows payment of rent for 1265 and 1266, it is to be presumed that all previous claims have been satisfied. To entitle the landlord to carry to the credit of 1264 any of the payments made in 1266, he must show that at the close of 1264 there was an arrear due to him—(Ranee Sharut Sundari *v.* Brodie, 1 W. R., 274). The payments in each year must be presumed to be for the current year till the contrary is shown; and the surplus payments must *primâ facie* be presumed to be for past, and not for subsequent years—(Tara Monee Dasi *v.* Kali Churun Surma, Sp. W. R., Act X, 14). When neither the debtor nor any circumstance indicates to which of several debts a payment is to be applied, the creditor may apply it at his discretion to any debt actually due and payable to him from the debtor.—(Ramesvar Koer *v.* Mehdi Hossain, I. L. R., 26 Cal., 39 P. C., 25 I. A., 179.) It is open to the Court, dealing with the facts of a case, to say whether, taking the receipts which extended over a number of years, and having

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regard to the circumstance that they did not specify the years to which the amounts related, the amounts paid in any particular year were partly for the rents of that year and partly for the rents due in respect of previous years.—Surjakanta Acharya *v.* Banesvar, I. L. R., 24 Cal., 251. In a suit by a landlord against his tenant for arrears of rent due for a portion of the year 1283 (1876), the defendant pleaded payment and called as his witness the plaintiff's agent, who admitted the receipt of certain payment from the defendant's under-tenants during the time for which the arrears were demanded ; but swore that they were payments made in respect of arrears due on account of previous years. *Held* that the defendant having pleaded payment, was bound to prove that the admitted payments were in respect of that portion of the year 1283 for which arrears were claimed—(Bibi Syefun *v.* Rudder Sahay, I. L. R., 7 Cal., 582.) Where money is paid and received as rent under a lease, a mere protest that it is accepted conditionally and without prejudice to a right to a prior forfeiture cannot countervail the fact of such receipt.—(Davenport *v.* The Queen, L. R. 3 App. Cas. 115; see also Kali Krishna *v.* Fuzle Ali, I. L. R., 9 Cal., 843.)

Receipts and accounts.

56. (1) Every tenant who makes a payment on account of rent to his landlord shall be entitled to obtain forthwith from the landlord a written receipt for the amount paid by him, signed by the landlord.

Receipt and accounts. Tenant making payment to his landlord entitled to a receipt.

(2) The landlord shall prepare and retain a counterfoil of the receipt.

(3) The receipt and counterfoil shall specify such of the several particulars shown in the form of receipt given in Schedule II to this Act as can be specified by the landlord at the time of payment :

Provided that the Local Government may, from time to time, prescribe or sanction a modified form either generally or for any particular local area or class of cases.

(4) If a receipt does not contain substantially the particulars required by this section it shall be presumed, until the contrary is shown, to be an acquittance in full of all demands for rent up to the date on which the receipt was given.

Extended to Orissa, (Not., Sept. 10th., 1891).

Sub-section 1 :—This section entitles every tenant to a receipt on payment of any rent,—(Narendro Chandra Lahiri *v.* Asmatulla, 1 C. W. N., xiv). Receipts signed by

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landlord's agent, if shown to be authentic, are *prima facie* evidence of payment but not conclusive evidence.—Sheik Ameer *v.* Yousoofali, 22 W. R., 439. See the definition of the term 'signed' in sub-s. 14 of s. 3. 'Signed' includes 'stamped'; 'signed by the landlord' does not necessarily imply signed by him personally. The receipt may be signed by the agent—See s. 187 (3) *post*. Section 188 of the Indian Contract Act says: "An agent, having authority to do an act, has authority to do every lawful thing which is necessary in order to such act. An agent having an authority to carry on business has authority to do every lawful thing necessary for the purpose, or usually done in the course of conducting such business." And s. 226 says: "Contracts entered into through an agent, and obligations arising from acts done by an agent, may be enforced in the same manner and will have the same legal consequences as if the contracts had been entered into and the acts done by the principal in person." The form of the receipt given in Sch. II of the Act shows that the receipt may be signed by the landlord or his "authorized agent." It also shows that payments and the dates on which they are made are all to be entered in the same receipt. Authority to give receipts may be either in writing or verbal.—Gopinath Chakravurti *v.* Uma Kanta Das Roy (1896), I. L. R., 24 Cal., 169. If there are several landlords, the authority must be from them all.

Signed by the landlord.

Stamps on receipts.

By clause (*c*), Article 53, of Schedule I to Act II of 1899, receipts granted for any payment of rent by a cultivator on account of land assessed to Government revenue are exempt from stamp duty. Receipts granted to cultivators by owners of revenue-free property, if for sums exceeding Rs. 20, should be stamped under the said article.

Sub-section (3). Proviso:—By a Notification, dated 30th January, 1888, published at p. 83, Part I, of the *Calcutta Gazette* of February 1st, 1888, the Local Government, under the proviso to sub-sec. (3), sanctioned a special form of receipt for certain areas then under settlement in the Rajshaye district. By a Resolution, dated the 8th May, 1890, published at p. 452, Part I of the *Calcutta Gazette* of May 14th, 1890, the Local Government sanctioned a special form of receipt to be used by landlords receiving rent paid by money orders, a separate receipt being given for each holding. (For forms of receipt, see p. 453 of the *Calcutta Gazette* of that date, as also p. 650, Part I, of the *Calcutta Gazette* of July 24th, 1889). The Local Government by Notification No. 378, L. R., dated 22nd Jan., 1894, published at p. 84, Part I, of the *Calcutta Gazette* of 24th Jan., 1894, prescribed a modified form of rent-receipt for use in the Orissa division and by Notification No. 872 T.R., dated 10th Oct., 1899, another for use in the Western Duars of the Jalpaiguri district.

Sub-section (4):—The receipt before it can form the basis of any presumption under this sub-section must be shewn to be a receipt granted by or on behalf of all the landlords, *i.e.*, in a case where there are several joint landlords, it must be shewn that the person by whom the receipt was signed was authorised by them all, either verbally or in writing.—(Gopinath *v.* Umakanta, I. L. R., 24 Cal., 169.)

Presumption.

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Receipts how to be proved :—Receipts should be proved by oral evidence. A tenant cannot be expected to summon all the *gomastas* of his zemindars to attest dakhilas. He can prove them personally as well as by witnesses.—(Rajessuri *v.* Shibnath, 4 W. R., Act X, 42; his own evidence is legally sufficient; Madhub *v.* Ramnath, 20 W. R., 264; Surjakant *v.* Banesvar, I. L. R., 24 Cal., 251). But he must prove them.—(7 W. R., 576; Ram Jadu *v.* Lukhinarain. 8 W. R., 488; Raj Mahomed *v.* Banoo, 12 W. R., 34; 13 W. R., 452. Bharat Roy *v.* Ganganarain, 14 W. R., 211.)

Tenant entitled to full discharge or statement of account at close of year.

57. (1) Where a landlord admits that all rent payable by a tenant to the end of the agricultural year has been paid, the tenant shall be entitled to receive from the landlord, free of charge, within three months after the end of the year, a receipt in full discharge of all rent falling due to the end of the year, signed by the landlord.

(2) Where the landlord does not so admit, the tenant shall be entitled, on paying a fee of four annas, to receive, within three months after the end of the year, a statement of account specifying the several particulars shown in the form of account given in Schedule II to this Act, or in such other form as may from time to time be prescribed by the Local Government, either generally or for any particular local area or class of cases.

(3) The landlord shall prepare and retain a copy of the statement containing similar particulars.

Extended to Orissa, (Not., Sept., 10th, 1891).

By a Notification, No. 377, L. R., dated 22nd January, 1894, published in the *Calcutta Gazette* of the 24th January, 1894, Part I., p. 83, the Local Government has under sub-section (2) prescribed a modified form of account for use in the Orissa division.

Penalties and fine for with-holding receipts and statements of account and failing to keep counterparts.

58. (1) If a landlord without reasonable cause refuses or neglects to deliver to a tenant a receipt containing the particulars prescribed by section 56 for any rent paid by the tenant, the tenant may, within three months from the date of payment, institute a suit to recover from him such penalty, not exceeding double the amount or value of that rent, as the Court thinks fit.

(2) If a landlord without reasonable cause refuses or neglects to deliver to a tenant demanding the same either the

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receipt in full discharge or, if the tenant is not entitled to such a receipt, the statement of account for any year prescribed in section 57, the tenant may, within the next ensuing agricultural year, institute a suit to recover from him such penalty as the Court thinks fit, not exceeding double the aggregate amount or value of all rent paid by the tenant to the landlord during the year for which the receipt or account should have been delivered.

(3) If a landlord without reasonable cause fails to prepare and retain a counterfoil or copy of a receipt or statement as required by either of the said sections, he shall be punished with fine which may extend to fifty rupees.

Extended to Orissa (Not., Sept., 10th, 1891).

The operation of this section is not limited to the case where the payment has been made by the registered tanant; when a landlord receives rent from a person, whose name has not been registered and thus recognises him as his tenant, he renders himself liable to the penalty provided by s. 58, if he refuses to deliver a receipt without reasonable cause.—(Norendra *v.* Asmatulla, 1 C. W. N., xix.)

Local Government to prepare forms of receipt and account.

59. (1) The Local Government shall cause to be prepared and kept for sale to landlords at all subdivisional offices forms of receipts, with counterfoils, and of statements of account, suitable for use under the foregoing sections.

(2) The forms may be sold in books with the leaves consecutively numbered or otherwise as the Local Government thinks fit.

Use of Government forms is not obligatry.—(Cal. Gaz. 16th sept. 1885, P. 1648, Supplemental).

Effect of receipt by registered proprietor, manager or mortgagee. Bengal Act VII of 1876.

60. Where rent is due to the proprietor, manager or mortgagee of an estate, the receipt of the person registered under the Land Registration Act, 1876, as proprietor, manager or mortgagee of that estate, or of his agent authorized in that behalf, shall be a sufficient discharge for the rent; and the person liable for the rent shall not be entitled to plead in defence to a claim by the person so registered that the rent is due to any third preson.

But nothing in this section shall affect any remedy which any such third person may have against the registered proprietor, manager or mortgagee.

Extended to Orissa, (Not., Sept. 10th, 1891).

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The Land Registration Act:—Section 78 of the Land Registration Act (Bengal Act VII of 1876) provides as follows:—No person shall be bound to pay rent to any person claiming such rent as proprietor, or manager of an estate or revenue-free property in respect of which he is required by this Act to cause his name to be registered, or as mortgagee, unless the name of such claimant shall have been registered under this Act; and no person, being liable to pay rent to two or more such proprietors, managers, or mortgagees holding in common tenancy, shall be bound to pay to any one such proprietor, manager, or mortgagee more than the amount which bears the same proportion to the whole of such rent as the extent of the interest in respect of which such proprietor, manager, or mortgagee is registered bears to the entire estate or revenue-free property. Section 79 of the same Act provides as follows:—The receipt of any proprietor, manager or mortgagee, whose name and the extent of whose interest is registered under this Act, shall afford full indemnity to any person paying rent to such proprietor, manager or mortgagee. The mere fact that a person is registered as owner under Act VII of 1876 (B. C.) does not entitle him to recover rent where his title is denied.—(Ram Bhushan *v.* Jebli Mahata, I. L. R., 8 Cal., 853; Sarasvati *v.* Dhunput, I. L. R., 9 Cal., 431. (Ram Kristo Dass (Mahalanavis) *v.* Sheikh Harain (Mahmad Jan), I. L. R., 9 Cal., 517; 12 C. L. R., 141.) "That section (section 78 of Act VII of 1876 B.C.) says," observed in this case the learned Chief Justice, "that no person shall be bound to pay rent to any person claiming such rent as proprietor or manager of an estate or revenue-free property in respect of which he is required by this Act to cause his name to be registered, or as mortgagee, unless the name of such claimant shall have been registered under this Act. It is contended that under the provisions of that section, the registered owner of a revenue-paying estate has a right to sue the tenants for rent, although he has not entered into any contract with them, and although he cannot prove a good title to the estate of which he is the registered owner. We think that the section does not say or mean anything of the kind. It is true that the owner of the estate cannot sue for rent, *unless he is registered;* but it by no means follows that he who is not the true owner can sue because he is registered. The point is very clear and has been decided by this Court on several previous occasions. Speaking for myself, I heartily wish it were the law that the registered owner, and the registered owner only, was entitled to sue the tenants for rent; and that, not only as regards revenue-paying, but all other estates. Unfortunately, however, that is not the law at present"—The registration under Bengal Act VII of 1876 is not only not conclusive proof, but no evidence at all, upon the question of the title of a proprietor so registered; and that such registration does not relieve a plaintiff from proving his title to land claimed by him (Ram Bhushan Mahto *v.* Jebli Mahto, I. L. R., 8 Cal., 853). The entries made under Bengal Act VII of 1876 by the Collector recording the names of proprietors of revenue paying estates are not evidence under sec. 35 of the Evidence Act of the fact of proprietorship.—(Saraswati Dasi *v.* Dhunpat Singh, I. L. R., 9 Cal., 431; 12 C. L. R., 12).

A registered owner.

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The present law:—This section seems to have extended the provisions of the Bengal Land Registration Act by providing that the receipt of the proprietor, manager, or mortgagee, or of his agent authorised in that behalf, shall be a sufficient discharge for the rent, and debars the person liable for the rent from pleading, in defence to a claim by the person registered, that the rent is due to a third person.

"Section 60 is new, and its object is to give an advantage to the landlord whose title is registered against a claimant who is not registered in the Collector's books."—*(Sir Steuart Bayley in the Debate.)* It has been accordingly held that no person claiming as a proprietor can recover rent from a tenant unless his name has been registered under the Land Registration Act. It is immaterial how the transfer of proprietorship has been effected, whether it is a case of transfer by purchase or a case of transfer by succession. Every person succeeding to the proprietary right in any estate must apply for registration of his name.—(Panak Lal Mandar *v.* Thakur Prasad Singh, I. L. R., 25 Cal., 717). When some of the share-holders get their names registered under the Land Registration Act in respect of fractional shares, all the landlords may sue jointly for the entire rent, but will get a decree for a share of the rent proportionate to the share in respect of which their names are registered. The penalty for non-registration under sec. 78 of the Land Registration Act is the forfeiture, not of the whole rent, but of the rent of the share in regard to which the landlord is unregistered.—(Nil Madhab Patra *v.* Ishan Chandra Sinha I.L.R., 25 Cal., 787; 2 C,W.N., 600). When an estate partly situated in Goalpara in Assam and partly in Rungpur was entered in the Touzi of Goalpara Collectorate in Assam and the landlord brought a suit for rent in Rungpur for lands lying in that district, *held* that plaintiff was entitled to maintain the suit although his name was not registered in the Rungpur Collectorate under Act VII of 1876, B. C., inasmuch as his name was registered in Goalpara under the Assam Regulations:—Surendra Narain *v.* Joynath, 1 C. W. N., civ. It was at first held that registration before the pendency of suit is necessary and registration before decree if made is of no avail.—Surjo Kanta *v.* Hemanta Kumari, I.L.R., 16 Cal., 706; Dharani Dhur *v.* Wajidunnesa, I. L. R., 16 Cal., 708. But the matter was reconsidered by a Full Bench and it was held that registration before decree was sufficient.—Alimuddin Khan *v.* Hiralal Sen, I. L. R., 23 Cal., 87. The same rule was laid down in Belchambers *v.* Hussan Ali Mirza, (2 C. W. N., 493), and in Abdul Khair *v.* Meher Ali, I. L. R., 26 Cal., 712; 3 C. W. N., 381). But actual registration of name is necessary to enable a person to recover rent; a mere order of the Civil Court for registration is not sufficient.—(Ugra Mohan Thakur *v.* Bideshi Rai, 5 C.W.N., 360).

Unregistered proprietor cannot recover rent.

Registration before decree sufficient.

A manager appointed under section 95 of the present Act must have his name registered before he can recover rents.—Makbal Ahmed *v.* Girish Chandra, I. L. R., 22 Cal., 639. So must an administrator, who is, as such, representative of a deceased proprietor and legal owner of his property.—McIntosh *v.* Jhara Molla, I. L. R., 22 Cal., 454.

A manager must register his name.

So an administrator.

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A suit for rent accruing due partly during the lifetime of a registered proprietor and partly after his death was brought by his representatives: the defence was that the suit was not maintainable as the plaintiffs were not registered proprietors and had no certificate under the Succession Certificate Act. *Held*, that sec. 78 of the Land Registration Act is not a bar to the realization of rent accruing due during the lifetime of the registered proprietor, but a suit for rent accruing due after the death of the registered proprietor is not maintainable by his represntatives, without having their names registered under the Land Registration Act. *Held*, also, that rent is not a "debt" within the meaning of sec. 4 of the Succession Certificate Act, and, therefore, no succession certificate is necessary—(Nagendra Nath Basu *v.* Satadal Basini Basu, I. L. R., 26 Cal., 536; 3 C. W, N., 294). See also Pramada Sundari Debi *v.* Kanai Lal Saha I. L. R., 37 Cal., 178). But a suit for arrears accruing after the death of the proprietor is not maintainable by his legal heir and representatives unless their names are registered.—Jibanti *v.* Gokul, I.L.R., 19 Cal. 760. But a Receiver appointed by a Court and suing as such to recover arrears which accrued during the lifetime of the deceased registered proprietor is not required to be registered before being entitled to sue.—Belchambers *v.* Hussan Ali 2 C. W. N., 493. A patnidar or ijaradar need not have his name registered in order to be entitled to sue for rent.—Sukarulla *v.* Bama Sundari, I. L. R., 24 Cal. 404. When a mortgagee had got his name registered as such under sec. 44 of the Land Registration Act and sued for rent, alleging that the right of redemption of the mortgagor had been extinguished by limitation, it was pleaded that in these circumstances the plaintiff was not entitled to sue, as he had not registered his name as proprietor. But it was held he was entitled to sue as mortgagee till the fact of the redemption of the mortgage was noted in the General Register under sec. 26 of the Act, and that so long as his name continued on the register, a receipt granted by the mortgagor proprietor did not operate as a valid discharge under sec. 78 of the Land Registration Act or sec. 60 of the Tenancy Act—Sundar Das *v.* Charitter Rai, 1 C. W. N., clxiii. In a suit for enhancement brought by a *sar-i-peshgi thikadar* on the ground that the defendant paid at a rate lower than the prevailing rent, it was held that the suit was for the declaration of enhanced rates payable in future, and was therefore not affected by the provisions of this section or of sec. 78, Act VII, B. C., of 1876.—Maugni Ram *v.* Seo Charan Mander, 1 C. W. N., clxxix.

Succession Certificate.

Legal heirs or representative must register.

Receiver not required to be registered.

Nor a patnidar or ijaradar.

Mortgagee.

A tenant cannot deny the right of a registered proprietor to distrain and plead payment of the rent to a third person whose name has not been registered.—Hanuman Ahir *v.* Govinda Kar, 1 C. W. N., 318). So that, if a tenant pays rent to the true proprietor, whose name has not been registered, he may be sued for it by the registered proprietor; nor can a tenant plead that the rent was due to a mortgagee to whom

Tenant cannot deny right of registered proprietor.

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the landlord had assigned part of his interest and whose name has not been registered.—Hem Chandra *v.* Raja Sir Sourindra Mohan 5 C. W. N., 452. But when a tenant in good faith and in the reasonable belief that the land held by him was included in the estate of a third person, attorned to such person four years before the institution of the suit, it was held that this did not estop the defendant from pleading that the rent was due to a third person, notwithstanding that the plaintiffs were registered proprietors.—Durga Dass *v.* Samuatra Akan, 4 C. W. N., 606. The effect of the attornment was to oust the plaintiffs from possession, and their remedy would apparently be, it was said, to bring a suit to recover possession of the land from which they had been ousted. By this section a defendant, in a suit for rent brought by a person registered as proprietor, is precluded from raising a defence that the plaintiff is a benamidar of another person and as such not entitled to rent.—Sadhu Charan Pal *v.* Radhika mohan Ray. 8 C. W. N., 695.

Tenant making payments in good faith to a person not registered.

Tenant cannot plead that the registered proprietor is benimidar.

Deposit of Rent.

The operation of ss. 61 to 64 was kept in abeyance by Act XX of 1885 till 1st February 1886, up to which the provisions of the old Act were in force so far as they related to deposits of rent.

Application to deposit rent in Court.

61. (1) In any of the following cases, namely :—

(*a*) when a tenant tenders money on account of rent and the landlord refuses to receive it or refuses to grant a receipt for it ;

(*b*) when a tenant bound to pay money on account of rent has reason to believe, owing to a tender having been refused or a receipt withheld on a previous occasion, that the person to whom his rent is payable will not be willing to receive it and to grant him a receipt for it :

(*c*) when the rent is payable to co-sharers jointly, and the tenant is unable to obtain the joint receipt of the co-sharers for the money, and no person has been empowered to receive the rent on their behalf ; or

(*d*) when thd tenant entertains a *boná fide* doubt as to who is entitled to receive the rent ;

the tenant may present to the Court having jurisdiction to entertain a suit for the rent of his tenure or holding an application in writing for permission to deposit in the Court the full amount of the money then due.

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(2) The application shall contain a statement of the grounds on which it is made; shall state—

in cases (*a*) and (*b*), the name of the person to whose credit the deposit is to be entered,

in case (*c*), the names of the sharers to whom the rent is due, or of so many of them as the tenant may be able to specify, and

in case (*d*), the names of the person to whom the rent was last paid and of the person or persons now claiming it;

shall be signed and verified, in the manner prescribed in section 52 of the Code of Civil Procedure, by the tenant, or, where he is not personally cognizant of the facts of the case, by some person so cognizant; and shall be accompanied by a fee of such amount as the Local Government from time to time by rule directs.

XIV of 1882.

Sub-section (1): Tenant:—In this chapter for the meaning of the word 'tenant' see cl. (3) of s. 3 and also s. 4. Tenure-holders, raiyats and under-raiyats are all tenants. This chapter is headed *General provision as to rent*, and therefore refers to all classes of tenants, unless expressly provided otherwise. The word "tenant" therefore includes a patnidar as well as an under-raiyat; see, however, s. 195 (*e*), *post*. The word "under-tenant" in s. 46 of Act VIII of 1869 (B.C.) was wide enough to include patni talukdars.—(Thakoor Das *v.* Peary Mohun, 22 W. R., 431.)

Tender:—A raiyat's tender of payment to be valid must be made by the recognized tenant and at the proper place, and to a person authorized to receive the same.—(Dulichand *v.* Meherchand Sahoo, 8 W.R., 138.) But it has been recently held that it is not necessary that the tenant must present the application in person and that a deposit of rent though not made by a tenant himself, but made on his behalf by a transferee of the holding is a valid deposit.—Behary Lal *v.* Basarat, I. L. R., 25 Cal. 289. Banerjee, J., in delivering judgment in this case observed as follows:—"The application here was made on behalf of the tenant though it was presented on his behalf by the transferee of the holding from him. The Bengal Tenancy Act does not make any provision as to how applications, other than those in suits, are to be made by or on behalf of the parties in a case like this. Neither s. 145 nor s. 188 applies to cases of this description. That being so, we think the view taken by the lower Appellate Court that an application, such as the one that was made in this case for the deposit of rent, was in substantial compliance with s. 61 is a reasonable view." Where rent was tendered to the plaintiff's ám-muktear but the plaintiff refused to accept it; it was held that the defendant was liable to pay interest on arrears in spite of such tender, because he omitted to take advantage of the procedure prescribed by s. 61.—Ransgit *v.* Bhagabati, 7 C. W. N., 720. Where a party wishes to make known to a zemindar that he has a right to a tenure,

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the rent of which the zemindar refuses to accept from him, it is not sufficient for him to put the money into Court in the name of the recorded zemindar along with his own name without stating what his claim is; he should give distinct notice to zemindar of the interest which he claims.—(Mrityunjai Sircar *v.* Gopal Chunder, 2 B. L. R., 131; 10 W. R., 466.) The deposit which is contemplated by this section is a deposit after the rents have become due; where a tenant deposited rent before it became due, he would not be entitled to the benefit of this section.—(Taramoni *v.* Jeebun Inandur, 6 W. R., Act X, 99.) A party under the old law was not entitled to benefit from a deposit, if it was piad in without a previous tender to, and refusal by the opposite party.—(Krista Protibur *v.* Alladini Dasi, 15 W. R., 4.) Clause (*b*) now extends the sphere of tender from the present to the past. The tender must be at a proper place and to a person authorized to receive the rent.—(Isan Chunder Ray *v.* Khajeh Ahsanullah, 16 W. R., 79.) In making the tender a mistake in the name of the taluk is an immaterial error, specially when there is no doubt that the talukdar is aware of the tender being made.—(Woomachurn Sett *v.* Huree Prosad Misser, 10 W. R., 101.) In a suit for rent, where an intervenor who, on his own account, pleads a deposit in Court made under this section is made a defendant by the Court, the fact of his being a defendant does not give rise to any equity as between the plaintiff and the other defendants.—(Greedharilall *v.* Chunder Persad, 21 W. R., 277.)

Subsection (1): clause (d):—Tenants who have been in the habit of depositing in Court the rent due to a landlord in his sole name, are not justified, without receiving notice or orders to that effect in making the deposit in the joint names of that landlord and another.—(John Rudd Rainey *v.* Nubokumar Mukerji, 24 W.R., 128.) The *bonâ fide* of the doubt ought to be enquired. The deposit of rent in Court under s. 61 of the Bengal Tenancy Act (where the tenant entertained a *bonâ fide* doubt as to who was entitled to receive it) operates as an acquittance; and where such deposit is proved as a defence to a suit for rent, the suit should be dismissed. Where in such a suit the defendant is found to have been not to blame for the litigation, he is entitled to his costs.—(Stalkartt *v.* Guru Das Kundu Chowdhry, I. L. R., 21 Cal., 680.)

Landlord has no right to dispute the validity of the deposit:—When after a deposit was made under s. 61 and the Court granted the tenant a receipt, the zemindar applied to the Court stating that the tenant had deposited rent upon false and unfounded grounds whereupon the Court being of opinion that the dispute between the parties was as to the form of receipt which the tenant was entitled to receive decided that such a dispute could not be taken cognisance of by him and cancelled his previous order and directed the tenant to take back the money deposited, *held* that the landlord had no right to come in and be heard in the matter, there being no machinery whatsoever provided by the Act for the Court to enter into a judicial enquiry in connection with the matter of the deposit:—Sridhar *v.* Rameswar I. L. R., 15 Cal., 166. As far as the tenant is concerned, after such deposit is made and a receipt granted, the Court is *functus officio*, and is not authorised to return the money to the

Court *functus officio* after deposit.

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tenant upon an application, made by the zemindar: *Ibid.*

The full amount of the money then due:—These words do not mean anything more than the words "what the tenant shall consider the full amount of rent due from him at the date of the tender to the zemindar" as they occur in s. 46 of Act VIII of 1869 (B. C.):—Sridhar Roy *v.* Rameshwar, 15 Cal., 166.

Effect of withdrawal of money deposited by tenant:—Where a Hindu widow made a grant of a putni tenure without any valid cause and on her death the reversionary heir brought a suit to set aside the putni grant, *held* that the reversioner having withdrawn money deposited by the putnidar as rent due by him under this section, this was *primâ facie* an admission that the putni was still subsisting:—Modhu Sudan *v.* E. G. Kooke, I. L. R., 25 Cal., 1.

Bona fide doubt as to who is entitled to receive rent:—A tenant has no right to bring a suit to have it determined which of two defendants, both of whom claimed rent from him, is his landlord:—Koylash *v.* Goluk 2 C. W. N., 61. Plaintiff brought a suit for rent of a plot of bastu land from the defendant who was a raiyat of the village under another landlord. The defendant pleaded that owing to dispute between rival landlords, he had deposited the rent under sec. 61 of this Act and that there was a full acquittance by the deposit. *Per* Ghose J.—It was not necessary to decide in the case whether the defendant was a raiyat under sec. 182 of this Act, and whether a deposit could be made under section 61. The deposit had been made in fact, and the question which remained for determination was as to who amongst the rival landlords was entitled to the money made available by the deposit. The present suit was therefore liable to be dismissed. *Per* Geidt J.—The suit was liable to be dismissed because section 182 applied and the deposit under section 61 was a valid deposit.—(Protap Chandra Das *v.* Biseswar Pramanick 9 C. W. N., 416.)

Fees leviable on applications to deposit rent:—For the fees to be levied under sub-section (2), see rule 5, Chap. VII of the Government rules, Appendix. They are:—"For deposits of rent under Section 61 (2), 4 annas for every such deposit of Rs. 25 or less, with an additional 4 annas for every Rs. 25 or part of Rs. 25 in excess: provided that in no case shall the fee exceed the sum of Rs. 5." By Notification of the Government of India, No. 4650 of the 10th September, 1889, it has been declared that "the proper fee to be charged on an application to deposit in any Court rent not exceeding the sum of fifteen rupees, shall be as follows:—If the amount deposited does not exceed Rs. 2-8, one anna; if the amount deposited exceeds Rs. 2-8 but does not exceed Rs. 5, two annas; if the amount deposited exceeds Rs. 10, but does not exceed Rs. 15, six annas; provided that no fee shall be chargeable on an application to deposit rent in respect of which a fee is chargeable under any rule framed under sub-section (2) of section 61 of the Bengal Tenancy Act, VIII of 1885. (1) (See High Court's General Rules and Circular Orders, Civil, Chap. II, part IV, rule 9.)

Limitation:—Co-sharer landlords being jointly and severally entitled to the

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rent, the service of notice of the deposit of rent on any of them under sec. 61 will not reduce the period of limitation to six months under art. 2 (a) of Sch. III—Rup Chand Mahton v. Gudar Singh, 5 C. W. N., xxx.

Receipt granted by Court for rent deposited to be a valid acquittance.

62. (1) If it appears to the Court to which an application is made under the last fore-going section that the applicant is entitled under that section to deposit the rent, it shall receive the rent and give a receipt for it under the seal of the Court.

(2) A receipt given under this section shall operate as an acquittance for the amount of the rent payable by the tenant and deposited as aforesaid, in the same manner and to the same extent as if that amount of rent had been received—

in cases (*a*) and (*b*) of the last foregoing section, by the person specified in the application as the person to whose credit the deposit was to be entered;

in case (*c*) of that section, by the co-sharers to whom the rent is due; and

in case (*d*) of that section, by the person entitled to the rent.

The principles inculcated in ss. 61, 62, 63 and 64 have been thus explained by the High Court in the case of Sridhur *v.* Rameswar, I. L. R., 15 Cal., 166:

"It would appear upon a consideration of these two sections (61 and 62) that if a verified application is made to the Court, and if it contains the grounds under which an application under s. 61 is authorized to be made and if it also contains the particulars which must be mentioned, the Court is bound to receive the rent and give a receipt to the tenant. The Court is not authorized at this stage of the proceeding, or at any subsequent stage, to enter into a judicial enquiry as to whether sufficient grounds in law exist entitling the tenant to make the deposit.....It will be observed that there is no machinery provided for the Court to enter into a judicial enquiry in connection with the matter of the deposit, nor is there any provision entitling the zemindar to come in and to be heard upon the subject.....The words 'the full amount of the money then due' in sec. 61, and 'the amount of the rent payable by the tenant' in s. 62, have no relation whatsoever to the amount of rent justly payable, but only to such rent due and payable. It is entirely at the option of the zemindar either to receive the rent deposited or not, just as he pleases. He may, if he objects to the amount of rent payable by the tenant for his holding, bring a suit under sec. 158 of the Act to have that matter determined, or he may bring a suit for the recovery of the whole of the arrear of rent due to him up to the date of deposit within 6 months of the date of the service of the

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notice upon him disregarding altogether the deposit made by the tenant; and if in that suit it be proved that the tenant had without reasonable or probable cause neglected or refused to pay the amount of rent due to the zemindar, the Court might award to him damages and costs in addition to the rent. But if, on the other hand, it appears that the suit of the zemindar was without reasonable or probable cause, the court might award the tenant damages as against the landlord. Upon these considerations it seems to us clear that when a deposit is made by a tenant, and the Court grants him a receipt, the zemindar cannot, in any way be prejudiced, and that the tenant makes such a deposit at his own risk"

Sub-section (2). A deposit of rent operates as an acquittance:—When a tenant entertains a *bonâ fide* doubt as to who is entitled to receive his rent and deposits it in Court under the provisions of this section, such deposit operates as an acquittanec and it is a good defence.—Stalkartt *v.* Guru Das Kundu, I. L. R., 21 Cal., 680.

Notification of receipt deposit.

63. (1) The Court receiving the deposit shall forthwith cause to be affixed in a conspicuous place at the Court-house a notification of the receipt thereof containing a statement of all material particulars.

(2) If the amount of the deposit is not paid away under the next following section, within the period of fifteen days next following the date on which the notification is so affixed, the Court shall forthwith—

in cases (*a*) and (*b*) of section 61, cause a notice of the receipt of the deposit to be served, free of charge, on the person specified in the application as the person to whose credit the deposit was to be entered;

in case (*c*) of that section, cause a notice of the receipt of the deposit to be posted at the landlord's village-office or in some conspicuous place in the village in which the holding is situate; and

in case (*d*) of that section, cause a like notice to be served, free of charge, on every person who, it has reason to believe, claims or is entitled to the deposit.

Service of notice:—The Local Government has framed the following rule regarding the service of notice under sub-section (2):—

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"Section 63 (2).—In cases (*a*), (*b*) and (*d*) of section 61 herein referred to, the notice of the receipt of the deposit shall be served by forwarding the notice by post in a letter registered under Part III of the Indian Post Office Act, 1866, or where the Court may deem it necessary, in the manner prescribed for the service of a summons on a defendant under the Code of Civil Procedure." See Appendix.

Limitation:—A suit for arrears of rent which fell due before a deposit was made under sec. 61 on account of the rent of the same holding must be brought within six months of the date of service of the notice of the deposit [Sch. III, Part I, art 2 (a)]. But see Mahomed Sukhurulla *v.* Ramya Bibi, 7 W. R., 487.

Payment or refund of deposit.

64. (1) The Court may pay the amount of the deposit to any person appearing to it to be entitled to the same, or may, if it thinks fit, retain the amount pending the decision of a Civil Court as to the person so entitled.

(2) The payment may, if the Local Government so direct, be made by postal money-order.

(3) If no payment is made under this section before the expiration of three years from the date on which a deposit is made, the amount deposited may, in the absence of any order of a Civil Court to the contrary, be repaid to the depositor upon his application and on his returning the receipt given by the Court with which the rent was deposited.

(4) No suit or other proceeding shall be instituted against the Secretary of State for India in Council, or against any officer of the Government, in respect of anything done by a Court receiving a deposit under the foregoing sections; but nothing in this section shall prevent any person entitled to receive the amount of any such deposit from recovering the same from a person to whom it has been paid under this section.

Effect of withdrawal of deposit:—In a suit in which a *patnidar* deposited two years' rent under this Act, and the rent was withdrawn by the landlord by a petition stating that "my tenant had deposited Rs. 1043 rent due to me," their Lordships the Privy Council Judges held that by such action the landlord must be regarded as having elected to recognize and confirm the patni tenure Madhu Sudan.—Singh *v.* Rooke I. L. R., 25 Cal., 1; 1 C. W. N., 433; L. R., 24 I. A., 164. The mere deposit of rent in the Collector's Office by the purchaser of an under-tenure in his own name and that of the registered tenant is not sufficient notice to the zemindar of such purchase, nor is the mere acceptance by the zemindar of rent so paid an acknowledgment on his part of the purchaser as his under-tenant; but it is otherwise when there is acceptance with notice, notwithstanding that the transfer has not been

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registered.—Mritan Jai Sarkar *v.* Gopal Chandra Sarkar, 2 B. L. R., A. C., 131; 10 W. R., 466.

Court-fee leviable on applications for the payment and return of deposits of rent:—The Government of India has remitted (see Notification, 4650 of the 10th [illegible]ber, 1889,) all fees payable under clause (*a*), para (4), and clause (*b*), para (2), of art. 1, Sched. II of the Court Fees Act, on applications for the payment of deposit of rent in which the deposit does not exceed Rs. 25, and the application is made within three months of the date on which the deposit first became payable to the applicant.—(High Court's General Rules and Circular Orders, Civil, Chap. II Part IV, rule 9, A (10), p. 78). But when the deposit exceeds Rs. 25, but is less than Rs. 50, or when the deposit exceeds Rs. 25, but the application has not been made within three months of the date on which the deposit became payable, the application for payment or for the return of the deposit will if presented to a Civil Court of original jurisdiction, be subject to a fee of 1 anna under para. 4, cl. (*a*), art. 1, Sched. II, Act VII of 1870. When the deposit amounts to or exceeds Rs 50, and in all cases in which the application is made to a principal Civil Court of original jurisdiction, the application for the payment or return of the deposit will be subject to a Court-fee duty of 8 annas, under para. 2, cl. (*b*), art. 1, Sched. II, Act VII of 1870.

Liability to sale for arrears in case of permanent tenure, holding at fixed rates and occupancy-holding.

65. Where a tenant is a permanent tenure-holder, a raiyat holding at fixed rates or an occupancy-raiyat, he shall not be liable to ejectment for arrears of rent, but his tenure or holding shall be liable to sale in execution of a decree for the rent thereof, and the rent shall be a first charge thereon.

This section has introduced a revolution: "We have every reason to believe that it (sale for arrears of rent) will be equally successful in the case of occupancy-holdings. Indeed, we are not without previous experience in respect of these also, many landlords of their own option and as the readiest way of getting rent, having brought raiyati-holdings to sale in execution of decrees obtained for rent. The largest amount of rent which a landlord can sue to recover is about four year's rent. There are few occupancy-holdings in fairly populated districts which are not worth four years' rent with the costs of getting a decree for it. If the landlord has any doubt on this point, he need not allow more than a single year's rent, or even than a single quarter's rent to fall into arrear without suing for it." (R. C. R. I. 58.)

Old law:—Sections 22 and 23, 52 and 59 of Act VIII B. C. of 1869 contained the old law on this subject. While ss. 22 and 23 of the old Act contemplated suits for ejectment against all *raiyats* and *ordinary leaseholders* for non-payment of rent and while s. 52 gave a right to the landlord to eject all *raiyats* and leaseholders for default of rent, s. 65 of this Act expressly protects permanent *tenureholders*, *fixed raiyats* and *occupancy raiyats* from ejectment. Even non-payment of rent does not subject them to forfeiture. This is consistent with ss. 10 and 25 of the Act. As to

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non-occupancy raiyats, the old law seems to remain in tact (s. 66). But where an under-tenure was transferable by sale, either by the title deeds or by custom of the country (s. 59 of Act VIII B. C. of 1869), it was held that a landlord who had a decree for arrears of rent could not eject the tenant, but could only sell the tenure or jote in question.—Tirbhobun Sing *v.* Jhona Lall (1872), 18 W. R., 206; Krishtendra Roy *v.* Aina Bewa [1882], I. L. R., 8 Cal., 675; S. C., 10 C. L. R., 399; Fakir Chand *v.* Fouzdar Misra [1884], I. L. R., 10 Cal., 547.

Rent shall be a first charge thereon :—The object of this section is that all permanent tenures and fixed and occupancy holdings are hypothecated to the landlord for rent; so that the tenant cannot, by disposing of the tenure to a third party, deprive the landlord of his lien upon it. There were at first some conflicting decisions on this point under the old law. Thus where the plaintiff had purchased under a Civil Court decree, the rights and interests of a tenant in a certain under-tenure or holding, and this under-tenure was afterwards brought to sale for arrears of rent by the zemindar, it was held that the purchaser under Act X sale, and not the plaintiff, was entitled to possession.—(Khoobhari *v.* Roghoobur, 2 W. R., 141; Gopal Mundle *v.* Subhodra Boistobee, 5 W. R., 205; Safurunnessa *v.* Saree Dhoobee, 8 W. R., 384; see also Ram Jeeban *v.* Peary Lal, 4 W. R., Act X, 30; Golam Chunder *v.* Nuddiar Chand, 16 W. R., 1; 15 W. R., 99; 17 W. R., 452; 20 W. R, 59; Sp. W. R., Act X, 48). But another decision seemed to be contrary to these, in which Phear, J., said: "The power which a Revenue Court has in this behalf is given to it by section 105 of Act X of 1859, and we think that those provisions only enable the Revenue Court to seize and sell that which at the time is the property of the judgment-debtor. There is nothing in the whole Act as we read it to indicate that the Legislature contemplated for a moment that the property of any other person than the judgment-debtor should be sold for the debt of the latter, even though the property had previously been the property of the judgment- debtor."—Pran Bandhu *v.* Sarba Sundari, 3 B. L. R., A. C., note 52; 10 W. R., 434. And this decision was followed in Samiruddi *v.* Hurish Chunder, 3 B. L. R., A. C., 49, where Loch, J., said: "But it was further urged that under the provisions of section 112 of Act X, of 1859, the tenure of the raiyat was hypothecated for rent. This is a mistake. The produce of the land is held to be hypothecated and the zemindar, instead of bringing a suit for arrear, may recover the same by distraint and sale of the produce."—(Compare also 10 W. R., 334, 446; W. R., 449; 15 W. R., 341; 17 W. R., 417; B. L. R., App., 49; 7 W. R., 183 F. B.; Dowlatgazi *v* Moonshi Munwar, 12 B. L. R., 485 note; Raj Kishore *v.* Bulbhuddur, S. D. A., (1859), 389; Wahed Ali *v.* Sadiq Ali, 12 B. L. R., 487, note. But it was later on sett'ed by a Full Bench that the tenure passes by the sale—Sham Chand *v.* Brojo Nath, 12 B. L. R., 484, F. B.; 21 W. R., 94. This decision was put by Chief Justice Couch upon the ground that "the holding or interest which had been created by the lease passes under such a sale"; and he argued that if this is not intended, when it is said the 'tenure' is to be sold, there was no need for the provision, because "the right, title and interest of the judgment-debtor could be sold under an ordinary decree." This

Old law.

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argument will apply even to the present section of the new Act. But with due deference to the learned Chief Justice, we might venture to submit that the provisions for sale of an under-tenure for arrears of rent prescribe a different mode of sale from the ordinary process of sale in execution, and expressly give a different effect to such sale, since they entitle the purchaser to avoid incumbrances: and if the mere provision that the tenure should be sold sufficed to pass the entire interest, in whomsoever vested, as argued by the Chief Justice, there would seem to have been no necessity to provide that incumbrances might be avoided, since to use the words of the Chief Justice the "tenure" means 'not the right or interest of any person in the land but the holding which has been created by the lease."

Present law.

The provisions of s. 65 of the present Act are, however more explicit. Whenever a tenure or holding is sold otherwise than in execution of a decree for arrears of rent, it is sold subject to the lien of the landlord on it for any rent due at the time of sale; the landlord is thus in the position of a first mortgagee, as far as the rent is concerned. —Tarini Prasad *v.* Naraiyan Kumari, I. L. R., 17 Cal., 301.

Rent first lien.

So, when a tenure is sold in execution of a mortgage decree, the purchaser takes it subject to the liability for the rent which had accrued due in respect thereof at the time of its purchase.—Maharani Dasya *v.* Harendro Lal Rai, 1 C. W. N., 458. And if he paid the amount to save the tenure from sale, he had no right of recourse against the former tenant. —*Ibid.* Where the rents had become due from the tenant whilst he held the tenure, and the landlord obtained a decree therefor after he (the landlord) had transferred the property to somebody else, such transfer would be no bar to the landlord enforcing his right against the tenure. "The relationship of landlord and tenant existed during the period for which rent was claimed, the rent was due to him as landlord, was decreed to him as such, and it was a charge on the tenure." It could not, therefore, be successfully contended that he could not have executed the decree under the provisions of the Tenancy Act, by the sale of the tenure in respect of which it was obtained.—Chatrapat Singh *v.* Gopi Chand Bothra, I. L. R., 26 Cal., 750. But see *contra* in the case of Hemchandra Bhunjo *v.* Monmohini Dasi. 3 C. W. N., 604. A thikadar brought a suit for the rent of a tenure more than two years after the expiration of his lease, and brought the tenure to sale more than five years after he had ceased to be in possession; and in the meantime the landlord had entered into possession of the tenure and had obtained a decree for arrears of rent falling due after the termination of the lease: it was *held* that there could not be two first charges standing simultaneously against the tenure, and that, under the circumstances, the only person entitled to the first charge was the landlord in possession; also that, at the time of the sale under the thikadar's decree, the tenure was subject, to the first charge existing in favour of the landlord for the rents which had fallen due after the termination of the lease.—Srimant Roy *v.* Mohadeo Mahata (1904), I. L. R., 31 Cal., 500; S. C., 8 C. W. N., 531. A 16 anna proprietor obtaining a decree for the whole rent due in respect of a *mokurari* tenure in a suit brought against all the tenants is entitled under this section of the Act to sell the tenure in execution of the decree,

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although, he recognized the fact that the tenants had subdivided the tenure and chose to accept a decree making each of them separately liable for his own share of the rent. Tarini Prosad Roy *v.* Narayan Kumari Debi I. L. R., 17 Cal., 301. Referred to and explained. Surbo Lal *v.* J. M. Wilson, I. L. R., 32 Cal., 680.

When sold for arrears of rent.

But, where a tenure or holding is sold in execution of a decree for its own arrears of rent, it passes to the purchasers free from all liability for previous arrears. The Judges observed:—"Rent falling due during the time that a tenure belongs to any particular tenure-holder is a first charge on the tenure, only so long as it is his, and has not been sold for arrears of rent. And this, we think, is made clear beyond doubt by clause (*c*) of section 169, which enacts that if any surplus remains of the proceeds realized by the sale of a tenure in execution of a decree for arrears of rent, after satisfying that decree, any rent falling due between the date of the suit in which the decree was passed, and the date of sale, shall be paid therefrom to the decree-holder. This provision of the law evidently shows that the legislature intended that the charge in respect of any rent falling due, between the date of suit and the date of sale in satisfaction of the decree passed therein, shall be transferred from the tenure to its sale-proceeds, and that the tenure shall pass to the purchaser at a sale for arrears of rent free of all liability created upon it by the default of the previous holder"—(Faiz Rahman *v.* Ram Sukh Bajpai, I. L. R., 21 Cal., 169. Hence when a landlord himself sold an occupancy holding in execution of a money decree, he could not again sell it in execution of a decree for rent due for past years, and that a purchaser at such a sale acquired no right in the holding.—(Ram Saran Poddar *v.* Mahomed Latif, (3 C. W. N., 62). Section 65, which provides that the "tenure or holding shall be liable to sale in execution of a decree for the rent thereof, and the rent shall be first charge thereon," only intends what is explicity laid down in subsequent sections of the Act, that is, those in Ch. XIV, namely that the charge should be enforced by the sale of the tenure or holding free of encumbrances, and if in any case the decree for rent either has not been, or cannot be, enforced by the sale of the tenure, we do not think that the charge created by s. 65 can be enforced in any other way."—(*Per* Norris and Banerjee, JJ.) Shoshi Bhusan *v.* Gogan Chunder, 22 Cal., 364. The "charge" referred to in this section is not such a "charge" as is defined by s. 100 of the Transfer of Property Act; and a landlord is not restricted by the provisions of this Act to executing a decree obtained by him for arrears of rent in the first instance by sale of the tenure or holding, but is at liberty to execute it in the ordinary manner against the person or other property, whether movable or immovable, of the tenant:—Fatick Chunder *v.* E. G. Foley, 15 Cal. 492. In the case of Tarini Pershad *v.* Narayan Kumari, I. L. R., 17 Cal. 301, Petheram, C. J., said as follws:—"This section, so far as I can see, creates a first charge upon the tenure for the rent of it, and puts the landlord in the position of a first mortgagee, so far as the rent is concerned, but the tenant remains personally liable for the rent. So that the landlord's position is this: he has a mortgage or charge upon the tenure for the rent, and he

Not a charge as defiend by s. 100 of Transfer of Property Act.

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has a remedy against the tenant personally for the debt due to him. That being the case, he has a right to avail himself of either of his remedies. He may, if he chooses, bring an action in which he claims to establish his lien upon the tenure to bring that tenure to sale, notwithstanding any other charge which may have been made upon it, and that whether the tenant had any other property and whether some one else had a charge by way of contractual mortgage upon the tenure or rent."

When the landlord is mortgagee of the holding.

When a landlord has taken a mortgage of the holding of a tenant he is debarred under s. 99 of the Transfer of Property Act from bringing the tenure to sale in execution of his rent decree otherwise than by instituting a suit under s. 67 of the Act:—Rai Ramani *v.* Surendra Nath Dutt, 1 C. W. N., 80.

The effect of sale upon unregisterd tenant:—The Full Bench decision in the case of Sham Chand *v.* Brojo Nath 12 B. L. R., 484, 21 W. R. 95 had, however, its effects upon the unregistered tenant under the old law. It has been laid down that the zemindar need not look beyond his registered tenant, and in any case the sale cannot be set aside for fraud on that ground alone.—(Bhabo Tarinee *v.* Prosunno Mayi, 10 W. R., 304; Sadhun Chuuder *v.* Gooroo Churun, 15 W. R. 99.) A decree for rent obtained by a landlord against his registered tenant renders the tenure in respect of which it is passed liable for sale, although it may have passed into other hands than those of the judgment-debtor.—(Rashbehary *v.* Pehary Mohan, I. L. R., 4 Cal., 346.) Where a tenure stood in the name of one or two original co-sharers, but the other co-sharer had bought all his right at a sale in execution of an ordinary decree, and thus was the owner of the whole tenure, but whose name was not registered, it was held that the tenure might be sold in a suit for eleven years' arrears against the registered tenant who admitted the claim for arrears.—(Doorga Prosad *v.* Sreekisto Moonshee, 2 Wyman's Rep., 212; Sp. W. R., Act X, 48.) And similarly a sale under decree in a suit for arrears due from all the shareholders in a taluk, but to which only the registered sharers seem to have been parties, although the other sharers were aware of the pendency of the suit, was held to pass the tenure.—(Alimoodeen *v.* Sabir Khan, 8 W. R., 60.) In execution of a decree against one of several joint holders of a tenure when it is clear that what is sold and intended to be sold is the interest of the judgment-debtor only, the sale must be confined to that interest, although the decree-holder might have sold the whole tenure, had he taken proper steps to do so, or although the purchaser may have obtained possession of the whole tenure under the sale. But if however, it appears that the judgment-debtor has been sued as representing the ownership of the whole tenure, and that the sale, although purporting to be of the right, title, and interest of the judgment-debtor only, was intended to be and in justice and equity ought to operate as a sale of the tenure, the whole tenure must be considered as having passed by the sale. If the question is doubful on the face of the proceeding, the Court must look to the substance of the matter and not to the form or language of the proceedings. Where a judgment-debtor was alone registered in the sherista of the zemindar as owner of a tenure, but it appeared that his two brothers, who were joint in estate with him, were entitled to an equal share

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with him in the tenure, but that the judgment-debtor was the manager; and when it appeared that the zemindar being only entitled to a share in the zemindari had obtined a decree against the judgment-debtor alone for arrears of rent, and in execution thereof proceeded to sell his right, title, and interest under s. 64 of the Rent Act—it was held that as the judgment-debtor represented his brothers, and as they were equally liable to pay the amount of the decree, upon the principle set out above, the latter were not entitled to recover their share of the tenure which the auction-purchaser had obtained possession of in execution of the decree against the judgment-debtor.—(Jeolal *v.* Gunga Prosad, I. L. R., 10 Cal., 996.) In this case the older decisions of Dular Chand *v.* Lala Chabeel Chand, L. R., 6 I. A., 72, and Bissessur Lal *v.* Maharajah Luchmessur, L. R., 6 I. A., 233, were commented upon. The plaintiff purchased in a private conveyance from the registered tenant of a permanent transferable interest in land such as is described in s. 26 of Act VIII of 1869 (B. C.), but no notice of the transfer was given to the zemindar. The zemindar subsequently brought a suit against the tenant for arrears of rent and obtained a decree, in execution of which he caused the tenure to be sold and himself became the purchaser. The plaintiff took proceedings under s. 311 of the Civil Procedure Code to set aside the sale, but his application was rejected on the ground, an erroneous one, that he was not a proper party to take such proceeding, and he did not appeal against the order rejecting it. It was held in a suit brought against the zemindar and the tenant to set aside sale, that in the absence of fraud the suit was not maintainable. The plaintiff might have satisfied the rent decree, and so prevented the sale, or he might have appealed against the order rejecting his application to set it aside. But having done neither, and the zemindar having had no notice of the transfer, the plaintiff was not entitled to treat the proceedings in the rent suit as a nullity on the ground that he was not a party to it.—(Panye Chunder *v.* Huro Chunder, I. L. R., 10 Cal., 496.) In a case the plaintiff had obtained a decree for possession of a taluk, but while the decree was under appeal the zemindar sued the registered tenant for arrears up to a period subsequent to such decree a sezawal was put in possession of the taluk, and a sale decreed in the rent-suit; and the plaintiff did not get himself registered or tender to stay the sale or apply for the removal of the sezawal: under these circumstances it was held that plaintiff would not set aside the sale, and that the whole tenure passed, there being the necessary provision to that effect in the lease.—(Forbes *v.* Protap, 7 W. R., 409.) But where a transfer tenure has been recognized the zemindar cannot sell for arrears in a suit against the registered holder.—(Umurt Lal *v.* Soorub Dasi, 2 W. R., Act X, 86; Samiraddi Khalifa *v.* Harrish Chandra, 3 B. L. R., A. C., 49; Pran Bundhu *v.* Sarba Sundari, *ibid.*, 52 note; Meah Jan *v.* Karuna Mayi, 8 B. L. R., 1; Ram Buksh *v.* Hridoy Mani, *ibid.* 10 note; Mojon *v.* Dula Gazi, 12 B. L. R., 492 note; Ram Kishore *v.* Kristamonee, 23 W. R., 106. Compare also Krista Chander *v.* Raj Krista, I. L. R., 12 Cal., 24. A decree for arrears of rent of an under-tenure was obtained against a tenant who became an insolvent, and whose tenure became vested in the Official Assignee by virtue of the provision of the Indian Insolvent Act, 11 and 12 Vict., C. 21. An application was made under ss. 59 and 60 of the

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Rent Law, Bengal Act VIII of 1869, for an order that the tenure should be sold for its own arrears. The Official Assignee objected to the sale, and contended that the decree-holder's only right was to prove in the insolvency for the amount of his debt. It was held that, whether arrears of rent became due before or after the insolvency of the judgment-debtor, the decree-holder was entitled to sell the tenure in execution of his decree.—Chunder Narain *v.* Kishen Chand, I. L. R., 9 Cal., 855. Where upon the death of the last recorded tenant, none of his heirs had his name recorded in the landlord's office, but they held the land and went on paying the rent and obtained separte rent-receipts for some years until recently when a rent-suit was brought against two of them only and the *jumma* was sold in execution of the decree : *held*, that after having accepted rent from all the heirs the landlord had no right to ignore some of them; that the sale did not pass the entire *jumma* but only the right, title and interest of the judgment-debtors :—Durga Hazra *v.* Samosh Akon, 4 C. W. N., 608. The heirs of the last recorded tenant with respect to an occupancy holding are entitled to claim recognition from the landlord and if the latter, ignoring them, bring a suit for arrears of rent and in execution thereof sell the holding the right of the former is not affected : *Ibid.* Where a decree for the rent was obtained against some of several heirs of a deceased tenant, *held* that the heirs who were not parties were entitled to contest a sale fraudulently obtained, although as heirs of a deceased registered tenant they had not got themselves registered in the landlord's *sheristha* and as such not competent to question the Watson and Company, decree :—Jagan Nath *v.* 19 Cal., 341. When occupancy rights, transferable by custom, have been transferred, it is no doubt open to the transferees to sue under the Specific Relief Act to have it declared that they have acquired certain rights, but if it is the object of such a suit to have it declared that the old tenant is no longer responsible for the rent, and that the transferee is so responsible to the landlord, such a declaration cannot be obtained without the service of the notice prescribed by s. 73 :—Ambica Pershad *v.* Chowdry Keshri, I. L. R., 24 Cal., 642. By suing the unregistered transferee of a particular *putni* jointly with the transferor the zemindar only recognises him as one of the joint holders of the *putni* but because he does so, he cannot be said to have waived the right secured to him to preserve the unity of the tenure held under him without splitting it and apportioning its rent :—Sourindra Mohan *v.* Surnomoyee, 3 C. W. N., 38 : I. L. R., 26 Cal. 103. A decree for rent of a tenure obtained against the registered tenant binds an unregistered transferee of the same who can shew no sufficient cause for not registering his name and may be enforced by sale of the tenure :—Shosi Bhusan *v.* Gagan Chunder, I. L. R., 22 Cal. 364 (at p. 372). All the co-owner of a taluk are jointy liable for the rent during the period over which their ownership extends and although the landlord sues only the recorded tenants for the rent, this would not relieve the unrecorded tenant, from the equitable liability of paying their share of rent to those of the recorded tenants

Decree aginst some of the heirs to the recorded tenant.

Suit for registration section 73.

Unrecorded tenant liable to contribution.

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who are obliged to pay the whole. The fact that one of the co-owners (whose name is not recorded and who is not a party to the suit for rent), sold away his interest before the date of suit he having been a co-owner at the time the liability arose, would not relieve him of the liability although he may not have derived any advantage from the payment made.—Gobinda Chander *v.* Basanta Kumar, 3 C. W. N., 384.

Rights of fractional co-sharers under this section,—One of several proprietors can hold the status of a tenant under the other co-proprietors of land which appertains to the common estate:—Jawadul Huq *v.* Ram Das, I. L. R., 24 Cal., 143. Section 65 should be read with s. 188 *post*. A decree obtained for rent by some of the co-shares in a zemindari and not by the whole body of zemindari could not be regarded as a decree under the Bengal Tenancy Act.—Durga Charan Mandal *v.* Kali Prosanna Sircar 1899, I. L. R., 26 Cal., 727, 3 C. W. N., 586; see also Prem Chand Nuskur *v.* Mokshada Debi 1887, I. L. R., 14 Cal., 201; and Jugobundhu Pattuck *v.* Jogu Ghose Alkushi 1887, I. L. R., 15 Cal. 47. And if an occupancy-holding is not saleable according to custom or usage it is not open to the co-sharer landlord (who could not be regarded in any other light as a mere creditor) to bring to sale the interest of the occupancy raiyat in the holding, and the raiyat would be entitled to object to the application for delivery of possession even after the confirmation of the sale, on the ground that it was illegal.—Durga Churn *v.* Kali Prosunna cited above. The Bengal Tenancy Act does not contemplate or provide for the sale of a holding at the instance of one only of several joint landlords, who has obtained a decree for the share of the rent separately due to him: such a sale must be under the provisions of the Civil Procedure Code and would not carry with it the special incidents attaching to a sale under the Bengal Tenancy Act. When, therefore, an occupancy holding, not transferable by custom or local usage, is sold in execution of a decree obtained by one of several joint landlords for the share of the rent separately due to him, the purchaser acquires nothing by his purchase, the judgment-debtor having no saleable interest in the holding:—(Saudagar Sarkar *v.* Krishna Chandra Nath, I. L. R., 26 Cal., 937; 3 C. W. N., 742). A fractional share-holder selling a non-transferable holding in execution of a decree which he obtained for his share of the rent is, therefore, in no better position than an outsider selling the holding in execution of a money decree:—(Jarip *v.* Ram Kumar De, 3 C. W. N., 747). The

Holding.

term "parcel" or "parcels" in s. 3 cl. 9 of this Act means "entire parcel" or "entire parcels" and is not "intended to apply to an undivided fractional share in a "parcel or "parcels" of land; undivided shares in parcels of land cannot constitute distinct "holding" within the meaning of this Act." An attachment of a tenure or holding execution of a decree for arrears of rent is not such an attachment as is contemplated by sec. 170 of the Act—Beni Madhab Rai *v.* Jaod Ali Sarkar, I. L. R., 17 Cal., 390). In a suit for rent for four years, it appeared that, for the first two years of the claim, the plaintiffs represnted the entire body of the landlords, and that for the last fwo years were only fractional landlords. The High Court held that the decree in such a case was not a rent-decree under the provisions of section 65 of the Bengal

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Tenancy Act, which presupposes that the decree should be in a suit in which all the landlord co-sharers are plaintiffs and not merely some of them.—Sheik Naimuddin *v.* Grish Chuder Ghosh, 6 C. W. N., 124. The sale of a tenure in execution of a decree for rent obtained by certain persons who did not constitute the entire body of landlords at the date of the suit and of the decree, and who were not the entire body of landlords at the date at which part of the claim for which the rent-suit was brought accrued due, would not pass the entire tenure but would merely pass the right, title and interest of the judgment-debtors in the tenure at the date of the sale.—*Ibid, per* Banerji, J.

Remedies open to the landlords for execution of rent decrees:—Under the old law when the tenure or holding was saleable, the only remedy open to the landlord in enforcing his rent decree was in the 1st instance to sell it up.—(Deanatullah *v.* Nazar Ali Khan [1868], 1 B. L. R., A. C., 216; 10 W. R., 341; Joki Lal *v.* Narsingh Narain Singh [1866], 4 W. R., Act X, Ruling 5; Hurish Chan Ira Rai *v.* The Collector of Jessore [1877], I. L. R., 3 Cal., 712; Lalit Mohun Roy *v.* Binodai Dabee (1886), I. L. R., 14 Cal., 14. And he was debarred from proceeding in execution against any other immovable property of the tenant until he could show that his decree could not be satisfied by attaching the person and movable property of the judgment-debtor. He could not moreover proceed against the person and property of the judgment-debtor simultaneously. Section 65 of the present Act has been construed to mean that the landlord, in the case of a saleable tenure or holding, has a double remedy: In Fotick Chunder Dey Sircar *v.* Foley, I. L. R., 15 Cal., 492, it has heen held that a landlord who obtains a decree for rent under the Bengal Tenancy Act is entitled, if he pleases, in the 1st instance to attach the movable property and the person of the judgment-debtor and that he is not obliged in the 1st instance to endeavour to execute his decree by putting up for sale the tenure, the rent in respect of which is in arrears, and for which he has obtained decree. In Tarani Prosad Roy *v.* Narayan Kumari Devi, I. L. R., 17 Cal., 301, it has been held that under the present law the landlord may bring a suit to enforce the statutory charge against the tenure or holding, or may elect to proceed as an ordinary creditor. Petheram, C. J., observed in this case:—"This section, so far as I can see, creates a first charge upon the tenure for the rent of it, and puts the landlord in the position of a first mortgagee, so far as the rent is concerned; but the tenant remains personally liable for the rent. So that the landlord's position is this: he has a mortgage or charge upon the tenure for the rent, and he has a remedy against the tenant personally for the debt to him. That being the case, he has a right to avail himself of either of his remedies. He may, if he chooses, bring an action in which he claims to establish his lien upon the tenure to bring that tenure to sale, notwithstsnding any other charge which may have been made upon it, and that whether the tenant had any other property and whether some one else had a charge by way of contractual mortgage upon the tenure. But if he thinks fit, he need not follow that course. He may bring an action to recover the debt the tenant owes him, in the same way as he might if he were a mortgagee in a

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case where there was a personal covenant in the mortgage-deed, giving the go-by to the mortgage and getting a personal decree against the debtor for the payment of the money. Having elected that course, he appears to be in the position of an ordinary creditor, able to realise his debt by the ordinary forms of attachment and sale of any property which the debtor has, subject to any charge which other persons may have upon it. In this particular case the decree is, on the face of it, only a money-decree for the payment of the money, and in my opinion may be enforced in any of the modes in which an ordinary money-decree may be enforced, either against the person of the debtor or any property of his that may be found." Where the rents had become due from the tenant whilst he held the tenure, and the landlord obtained a decree therefor after he had transferred his property to somebody else, the decree was a charge upon the tenure and it could be enforced under the Bengal Tenancy Act.—Chatrapal Sing *v.* Gopichand Bothra, I. L. R., 26 Cal., 750. But see *contra* in the case of Hemchandra Bhunja *v.* Munmohini 3 C. W. N., 604.

Decree for rent falling due after previous suit and sale :—A decree for rent falling due between the date of a previous suit and the date of the sale in satisfaction of the decree passed therein is not a decree within the meaning of this section :—Faez Rahaman *v.* Ramsak Bajpai, I. L. R., 21 Cal., 169. Where a decree was passed under the old Rent Law but the assignment and the application by the assignee for execution was made after the Bengal Tenancy Act came into force, *held* that cl. (*h*) of sec. 148 of the Act applied to the execution proceedings and the sale on such an application, which is prohibited by that clause is no sale under the Rent Law :—Shoshi Bhusan *v.* Gagan Chunder, I. L. R., 22 Cal., 364.

Application for execution by assignee of rent decree, s. 148, cl (h).

Liability of auction-purchaser for rent :—Where a tenure is sold in execution of a decree, the auction-purchaser is liable for the whole instalment of rent accruing due after his purchase, but before the confirmation of the sale ; rent is to be regarded not as accruing from day to day, but as fallig due only at stated times according to the contract of tenancy or in the absence of any contract, according to the general law laid down in sec. 53 of Bengal Tenancy Act :—Satyendra Nath *v.* Nilkantha, I. L. R., 21 Cal., 383, but where a tenure is sold in execution of a decree for arrear of rent, which fell due before sale, the auction.-purchaser is not liable.-*Ibid* The purchaser becomes a tenant only from the date of the confirmation of the sale and the arrears accruing due between the date of sale and date of confirmation of sale, must be treated as arrears of rent payable by outgoing tenant whose interest does not cease till the sale is confirmed.—Karunamoy *v.* Surendra Nath, 2 C. W. N., cccxxvii, 327 (notes). Rent is by operation of law the first charge on a tenure, and a person who purchases the same at an execution sale must, in the absence of anything to denote the contrary,, be taken to purchase it, charged with the rent which is due in respect of it at the time of its purchase :—Srimati Moharanee *v.* Harendra Lal, 1 C. W. N., 458. But a purchaser of a tenure is not personally liable for its rent which fell due before the date of purchase, although the tenure may be liable for such rent :

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—Sreemutty Jogemaya *v.* Girindra Nath, 4 C. W. N., 590; see also Rash Behary *v.* Peary Mohun, I. L. R., 4 Cal., 346.

Decree for rent against a Hindu widow:—A decree for arrears of rent obtained against a Hindu widow was put into execution after her death against properties forming her father's estate in which she had only a life interest, *held*, that it was a decree merely against her personally and was to be satisfied out of whatever she left at her death and that the estate which had passed to the next heirs was not liable:—Kristo Gobind *v.* Hem Chunder, I. L. R., 16 Cal., 511.

Movable property liable to attachment:—A decree for arrears of rent obtained by the raiyat against his under-raiyat is liable to attachment at the instance of the landlord as movable property.—Mohesh Chandra *v.* Guru Prasad, 13 W. R., 401.

What is not liable to attachnent in case of a cultivator:—When the judgment-debtor is an agriculturist, his implements of husbandry, and such cattle and seed-grain as may, in the opinion of the Court, be necessary to enable him to earn his livelihood as such, are, by section 266 (*b*) of the Code of Civil Procedure, exempt from attachment and sale in execution of the decree; but the materials of his houses and other buildings belonging to and occupied by an agriculturist, though exempt from attachment or sale in execution of ordinary decrees [cl. (*c*) of section 266 of the Code of Civil Procedure], are yet liable to be attached and sold in execution of decrees for arrears of rent [see proviso (*a*) to section 266 of the Code of Civil Procedure].—Maniklal Venilal *v.* Lakha [1880], I. L. R., 4 Bom., 429; and Radha Krishna Hakamji *v.* Balvant Ramji [1883], I. L. R., 7 Bom., 530.

Civil Procedure Code, s. 546:—A decree for arrears of rent is a "decree for money" within the meaning of s. 546, C. P. C.,—Banku Behary *v.* Syama Charan, I. L. R., 25 Cal., 322.

Ejectment for arrears in other cases.

66. (1) When an arrear of rent remains due from a tenant not being a permanent tenure-holder, a raiyat holding at fixed rates or an occupancy-raiyat, at the end of the Bengali year where that year prevails, or at the end of the month of Jeyt where the Fasli or Amli year prevails, the landlord may, whether he has obtained a decree for the recovery of the arrear or not, and whether he is entitled by the terms of any contract to eject the tenant for arrears or not, institute a suit to eject the tenant.

(2) In a suit for ejectment for an arrear of rent a decree passed in favour of the plaintiff shall specify the amount of the arrear and of the interest (if any) due thereon, and the decree shall not be executed if that amount and costs of the suit are paid into Court within fifteen days from the date of the decree, or, when the Court is closed on the fifteenth day, on

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the day upon which the Court re-opens.

(3) The Court may for special reasons extend the period of fifteen days mentioned in this section.

Extended to Orissa, (Not., Sept. 10th, 1891).

This section should be read with ss. 89 and 156 of the Act.

Old Act:—See ss. 22, 23 and 52 of Act VIII of 1869 B. C.

Sub-section (1): Due by a tenant:—A suit for ejectment will lie under this section for arrear of rent a bhaoli tenure. But a suit which is in reality a claim for compensation for use and occupation of lands cannot be described as a suit for arrear of rent under s. 52 of the Bengal Act VIII of 1869.—(Kishen Gopal *v.* Barnes, I. L. R., 2 Cal., 374.) The definitions of 'tenant' and 'raiyat' under this Act are clear, and 'rent' means rent in kind or money.

At the end of the year:—A raiyat cannot be ejected under this section, for an instalment of rent which falls due in the middle of the year.

Middle of the year.

The right to eject for non-payment accrues only when an arrear remains, due at the end of the Bengali year or at the end of the month of Jeyt of the Fasli or Willaytee year, as the case may be.—(Savi *v.* Chand Sarkar, Marsh., 384; Sreeram *v.* Juggernath. 1 Ind. Jur., 187; 5 W. R., Act X, 45.) A landlord who sues for arrear of rent, for the whole of one year and a portion of the next, and also for ejectment is not entitled to a decree for the latter. The right to ejectment under s. 22 of the Rent Act (Bengal Act VIII of 1869) accrues at the end of the year, and forfeiture or determination of the tenancy thereupon takes place, but if the landlord sues for subsequent arrears, he treats the defendant as his tenant, and the right acquired under that section must be taken to have been waived.—(Jogeshari Chowdrain *v.* Mahomed Ibrahim I. L. R., 14 Cal., 33.) The same view has been held under the New Act where a suit is broudht for recovery of rent before the expiry of the year in which it falls due, the landlord is not entitled to eject the tenant under this section in execution of such a decree:—Guru Dass *v.* Nabo Kishore, I. L. R., 26 Cal. 199 And under no circumstances can a landlord who has received the rent of a subesquent year, eject a raiyat on the ground that the rent of the previous year is due.—(Sheik Peer Bux *v.* Mouzah Ally, Marsh., 25; 1 Hay, 89.) "The receipt of rent," observed the Chief Justice in this case, "had the same effect as if the plaintiff had at the commencement of 1268 created a new tenancy. If he had done so, it is clear the defendant could not be ejected for non-payment of rent for 1267. So, if the plaintiff had obtained judgment in this suit to oust the defendant for non-payment of rent for 1267, and had afterwards, instead of executing the judgment allowed the defendant to continue in possession, and pay rent for 1268, it would have been a bar to his afterwards executing the judgment." Receipt of rent subsequent to a decree for ejectment under this section from a tenant against whom the decree was passed renders the execution of the decree impossible.—Nubo Kishen *v.* Hurish Chunder, 7 W. R., 142.

Waiver.

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As to forfeiture for non-payment of rent, see ss. 43, 25 and 10, *ante*. Receipt of rent is not *per se* a waiver of every previous forfeiture; it is only evidence of a waiver.—(Chundernath *v.* Sirdir Khan 18 W. R., 218.) Subsequent receipt of rent was waiver of the right of re-entry stipulated from the contract.—(Kali Kripsha *v.* Fazal Ali, I. L. R., 9 Cal., 843.)

Subsisting landlord and assignment of rent:—When a landlord parts with his interest after obtaining a decree for ejectment, the decree cannot be put into execution by his transferee.—Hem Chandra *v.* Monmohini 3 C. W. N., 604. When arrears of rent have been assigned to a third party they are no more than civil debts, the assignor is no longer the landlord, and the tenant cannot be ejected under this section for non-payment.—Chattrapat Sing *v.* Haji Mirza, Appeal from original decree No. 362 of 1895, 15th February, 1898. When a rent decree is obtained by a landlord and afterwards assigned to a third party, the assignee cannot execute the decree unless the landlord's interest has been vested in him [section 148, clause (*h*), *post*].—Dinanath *v.* Golap Mohini, C. W. N., 183.

Who are protected under this section:—As to forfeiture for non-payment of rent, see ss. 43, 25 and 10, *ante*. Only permanent tenure-holders, fixed raiyats and occupancy-raiyats are protected under this section. The penal provisions applies to all other tenants, raiyat or under-raiyats, tenure-holders, or farmers. It has, however, been held that s. 52 of Bengal Rent Act was applicable both to cases where the right to cancel a lease arises under the provisions of the Act and to cases where the right arises under a agreement between the parties. But the object of the section being to prevent a forfeiture if the rent be paid within the time specified by the section, the Court will grant relief against a forfeiture where the rent is so paid.—Dulichand *v.* Rajkissore, I. L. R., 9 Cal., 88; 11 C. L. R., 389. The same principle was applied on the equitable ground to a mokurari lease where the covenant was that default of payment of rent will cause forfeiture—Mahomed Ameer *v.* Peryag, I. L. R., 7 Cal., 566; Duli Chand *v.* Meher Chand, 12 P. L. R., 439; Mothura Mohun *v.* Ram Lal, 4 C. L. R., 469; compare also Brojendra Kumar *v.* Bungo Chunder, 12 C. L. R., 389; Golabalee *v.* Kootoobollah I. L. R., 4 Cal., 527; compare 19 W. R., 349; 22 W. R., 376) But as the Act is intended only for agricultural lands and for the protection of peasanats, suit for ejectment from land assigned for building purposes brought upon a contract will not possibly lie under this section.—(Ramnarain *v.* Nobin Chunder 18 W. R., 205; see also in the matter of Brohmomayi Bewa, 9 B. L. R., note, 109; 14 W. R., 10.) The word used in the section is 'tenant,' and the definition of 'tenant' does not exclude tenants of homestead land or of land used for manufactories. The word 'land' is not defined in this Act. Taking its definition from Act V of 1867, B. C., or Act X of 1871, B. C., or Act IX of 1880, it appears that this section will apply to tenants of houses, buildings, and other tenements, even if there be no contract prescribing forfeiture for non-payment of rent. The effect of such a

Does this section apply to tenant of houses, homestead lands or manufactories.

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proposition might be that if you take a house for six months and default to pay rent, the whole agreement may be rendered void by a suit of ejectment. But the definition of the word 'tenant,' read with s. 4, will show that a tenant is either tenure-holder, or raiyat, or under-raiyat. A tenure-holder is a rent receiver, and the latter two are agriculturists. Therefore the tenant of a house would fall under neither of these classes. See the Collector of Monghyr *v.* Hakim Madar Buksh, 25 W. R., 136.

Obtained a decree or not:—The landlord may either claim arrears of rent and ejectment in the same suit or if he has got a decree for arrears of rent, when he did not claim ejectment, may sue only for ejectment and put in the decree for arrears of rent, if unsatisfied, as evidence.—(Sheikh Mahamad Hossein *v.* Boodhan Sing, 7 W. R., 374; Sheikh Abdul Rahman *v.* Digambari Dasi, 18 W. R., 477.)

Entitled by contract or not:—The liabilities to ejectment under this sub-section are independent of any contract between the parties, and are an incident of all tenancies.

Sub-section (2) : The decree what to contain?—It is absolutely necessary that the decree shall specify the amount of arrears, and if it fails to do so, it ought to be set aside—Shah Ali Hossain *v.* Nundu Khan, 2 All., 62. This seems to follow from the wording of the Sub-section, but it has been held that a decree for ejectment passed under section 66, sub-section (2), need not incorporate the terms as to the ejectment being avoided by payment within fifteen days from the date of the decree. These terms are rather in the nature of a direction to the Court of execution.—Bodhnarain *v.* Mohummed Moosa, I. L. R., 26 Cal., 639; 3 C. W. N., 628.

Paid into Court:—The letter of the law does not assert that the arrears be in saving a forfeiture and not by his transferee or by any other party interested paid in by the tenant of the tenure. A third party may also pay the amount.—(Saroda Prosad *v.* Nobin Chunder, Marsh., 417; 2 Hay, 527; or an under-tenant—Indur Prosad *v.* Campbell, I. L. R., 7 Cal.; see s. 172, *post*.) But in a suit for ejectment under s. 52 Act X of 1859, against *A* on the ground of non-payment of rent, *B* has no right to intervene and be made a defendant on the allegation that he is really tenant of the land in question.—(2 Hay, 452; Marsh., 374; 6 W. R., Act X, 51.) Payment into Court by a judgment-debtor within fifteen days from the date of decree of rent, interest, and costs, with a protest as to the sum improperly charged against him as interest, is a sufficient payment within the meaning of this section to save him from liability to be ejected from his tenure. There is no analogy between deposits made to prevent the sale of mortgaged property and payments made under the provision of this section.—(Srishtidhur *v.* Doorga Narain, 17 W. R., 462.) Where in a suit for rent of the current year and for ejectment, supported by a previous unsatisfied decree, a decree was passed for the rent of the current year without including the amount claimed under the previous unsatisfied decree, it was held, that the defendant, having paid the amount of the arrears specified in the decree had saved himself from ejectment,—(Savi *v.* Mohesh Chunder, Sp. W. R., Act

Payment by 3rd party.

What is sufficient payment.

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X, 29.) When the money is brought into Court on the fifteenth day or the next opening day, but it is not received by the Court, because according to some departmental rules the money is to be paid into the Treasury and the tenant uses diligence to comply with such rules and pays the money into the Treasury on a subsequent date, he makes a sufficient compliance with the decree.—(Gujadhur Paurec *v.* Naik Pauree, I. L. R., 8 Cal., 528.)

Fifteen days from the date of decree:—Under this section a decree for ejectment must be conditional on the defendant not paying the decreed rent within 15 days—(Landa *v.* Binodelal, 6 W. R., Act X, 37; Kadir Gazee *v.* Mohadevi Dasi, *Id.*, 48; Buksh Ali *v.* Ramtanu Gui, *Id.*, 64). In the matter of Sheik Gazee v. Baharoollah, 13 W. R., 240), it was held that where the plaintiff sued for arrears of rent praying that if they were not paid, the defendant should be ejected, and the Deputy Collector gave him a decree setting forth that the prayer was for a proceeding under section 78, Act X of 1859, and ordering that there should be such a proceeding to execute, the order was an order for ejectment. Where a decree is appealed against, the time of grace shall commence from the date of the decree of the Appellate Court. For, in order to save a holding, the defendant must not only deposit the costs of the first Court, but also those of the Appellate Court—(Nobo Krishto *v.* Ramessur, 2 Wyman's Reports, 75; 18 W. R., 412, note; Sheik Abdool Rahman *v.* Digumbari Dasi, 18 W. R., 477; Rao Baneeram Nadian of Rao Madhubram (minor) *v.* Ram Nath Shaha, 10 B. L. R., Ap. 2). If the decree is altered or amended on review or appeal, the fifteen days' grace dates from the final decree in the case—(Radha Mohun *v.* Bukshee Begum, Marsh., 471; 18 L. R., 477; Noorali v. Konli Mian, I. L. R., 13 Cal., 13; Ramnarain *v.* Raghu Nath, I. L. R., 22 Cal., 467. Where, however, only an ineffectual attempt had been made by the Court of first instance to modify a decree in review which was pronounced illegal, it was held that the fifteen days were to be reckoned from the only decree in the case, *i. e.*, the original decree of the Munsif.—Poresh Nath *v.* Krishna, 23 W. R., 50; and the day on which the decree was passed should be excluded from computation—(Shoopalal Sing *v.* Nubi Ashruf Khan, 3 All., 342). Where, however, the decree was not modified in review, it was held that the time should run from the original decree—(Paresh Nath *v.* Kristo Lal, 23 W. R., 50). When a tenant has been sued for arrears of rent and a decree obtained against him under Bengal Act VIII of 1869, section 52, which provides for the stay of execution if the amount of arrears together with interest and cost of suit be paid into Court within fifteen days from the date of the decree, and the Court is closed on or before the first day of the period so limited, the tenant is at liberty to pay into Court the arrears, interest and costs on the first day that the Court re-opens; and if he does so, execution must be stayed—(Hossein Ali *v.* Donzelle, I. L. R., 5 Cal., 906.)

Time of grace from what period to run?

Closed holiday.

Sub-section (3): Power to extend the time of grace:—A court has power to extend the period of grace and to stay the execution of a decree for a longer period

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than fifteen days, but not to shorten the period. This discretionary power is also vested in the Appellate Court—(Nobokisto Mukerji *v.* Ramessur Gupta, 18 W. R., 412 (note): 2 Wyman Act X, 75; Rao Beniram *v.* Digumbari Dasi, 18 W. R., 477). Under the old law it was held that Court may extend the time only at the time of passing the decree, but not in course of execution. The section evidently contemplated the procedure before the decree. So it was held that the Court, whose duty it is to execute a decree, is bound to execute it in the shape in which the decree comes before it, and has no authority to permanently stay the execution of any portion thereof, *e. g.*, where a decree is for money and for ejectment in the event of non-payment within fifteen days, the Court executing is not competent to extend the period for payment in order to save the judgment-debtor from the alternative consequence—(Sankur Singh *v.* Huree Mohan, 22 W. R., 460; Gokhlanund *v.* Laljee Sahoo, 21 W. R., 11; Puresh Nath *v.* Kristolal, 23 W. R., 50). But under the present law it has been held by Prinsep and Banerjee, JJ. (Rampini, J. *contra*) that the extension of time authorised by sub-sec. 3 can be granted by the Court after decree:—Babu Bodh Narain *v.* Mahomed Moosa, 3 C. W. N., 628: I. L. R., 26 Cal., 639. (*per* Prinsep, J.), such powers may be exercised under s. 244, C. P. C., and the exercise of such power does not modify the decree itself: *Ibid*.

Civil Procedure Code s. 244.

Appeals from such decrees:—Under the old law there have been conflicting decisions on this point. In Parbutichurun Sen *v.* Shaik Mondari, I. L. R., 5 Cal., 594, 5 C. L. R., 513, it has been held that an appeal does not lie to the High Court from a decision of the District Judge, staying execution in a suit for arrears of rent and for ejectment where the value of the amount decreed is less than Rs. 100. Nor can an application, made to eject the tenant on his default to pay into Court the money due under the decree within the time fixed by section 52 of Bengal Act VIII of 1869, confer such right of appeal. In suits instituted under Bengal Act 1 of 1879, for arrears of rent and ejectment on account of the non-payment of arrears of rent, a second appeal lies to the High Court, this class of cases not being within the provision of section 137 of the same Act—(Ramjan Khan *v.* Raman Chamar, I. L. R., 10 Cal., 89). The decision of Parbutichurnn Sen *v.* Shaik Mondari, has been overruled in the Full Bench decision of Tulsi Panday *v.* Lala Bachalal, 12 W. R., 223. The judgment of the Full Bench was as follows: "*Primâ facie* in a suit of this kind the appellant is entitled to a second appeal. The question is whether that right is taken away by section 102 of Act VIII (B. C.) of 1869? That section only applies where the amount sued for, or the value of the property claimed, does not exceed Rs. 100; and unless that fact does appear either from the finding of the lower Court, or elsewhere upon the proceedings, it seems to us that we have no right, (more specially as we are only empowered here to deal with points of law), to draw any inference to that effect. We are therefore, of opinion, that this Court has jurisdiction to entertain the appeal."

Appeals.

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67 An arrear of rent shall bear simple interest at the rate of twelve per centum per annum from the expiration of that quarter of the agricultural year in which the instalment falls due to the institution of the suit.

Interest on arrears.

This section should be read with ss. 68, 178 (3) (h) and s. 179 *post*.

Shall bear interest:—The original section (21 of Act VIII of 1869 B. C.) said : "Unless otherwise provided by written agreement (instalment of rent) shall be liable to interest at twelve per centum per annum." The old law has been expressly overruled by the present section which ought to be read with cl. (*h*) of sub-section (3) of s. 178. So that under the present law no contract for a higher or lower interest than twelve per cent. will be valid, and it is no longer in the discretion of the Courts to adjudge a lower interest than twelve per cent., for the section says *shall bear* simple interest. No compound interest is recoverable. The following decisions under the old law which laid down that the Court has a discretionary power of awarding interest or not and which were based upon the words *liable* to interest are therefore to be considered as overruled.—(Beckith *v.* Kristo Jeebun, Marsh., 278; Kasinath *v.* Mynuddin, 1 W. R., 154; Rajah Satyanand *v.* Zahir, 6 B. L. R., App., 119; Maharajah Dehraj Mahtab Chand *v.* Sreemati Dev Kumari 7 B. L. R., App., 26; Radhika Prosunno *v.* Urjoon., 20 W. R., 128; Maharani Indar Jeet *v.* Khajeh Abdul Hossein, 2 Board's Rep., 210; Musst. Bibi Faseehun *v.* Musst. Ashrufunissa *alias* Awanee.) Under the terms of this section interest at the rate of 12 p. c., p. a., must be decreed. The Courts have no discretion in the matter. Only if damages are awarded under sec. 68, should interest not be decreed. Under the former law it has been held that when a decree for rent at an enhanced rate is obtained, interest runs on the arrears at this rate from the date on which they became due (Ahsanullah *v.* Aftabudin Mahomed 3 C. L. R.. 382. Even when a landlord has no village-office and has not under sec. 54 (2) appointed a convenient place for payment, arrears of rent will carry interest—(Fakir Lal Goswami *v.* W. C. Bonnerjee, 4 C. W. N., 324). Where a kabuliyat stipulates for the payment of interest upon all sums not paid on a fixed date but the landlord accepts sums due on account of principal on successive dates, from time to time for a series of ten years, without making any demand for interest, and without applying any of the sums paid to the discharge of an interest the Court is not in error in holding that the landlord has waived his claim to interest—Dindoyal *v.* Prankishen, 2 Hay, 423; Marsh., 394. This case, however, has been distinguished in the case of Johorilal *v.* Bulluvlal, 4 C. L. R., 349; I. L. R. 5 Cal., 102, which has laid down that the mere non-enforcement by a landlord even for a series of years of his right to interest upon arrears of rent does not amount to a waiver

Change of law.

No agreement against interest valid.

No discretionary power in Courts to reduce the interest.

Where there is no village office.

Waivor.

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of such right—(Johari Lall *v.* Bulluv Lal I. L. R., 5 Cal., 102; 4 C. L. R., 349: Rati Kant Basu *v.* Gangadhar Biswas, W. R., F. B., 13; Shyama Charan Mandal Hiras Mulla, I. L. R., 26 Cal., 160). This seems now to be the law.

How interest is to be calculated:—All arrears of agricultural rents payable quarterly have interest calculated quarterly, running for the expiration of the quarter in which the instalment of rent fell due. But where rent is payable monthly it has been held that interest should be calculated monthly and that the provision in section 67 of the Act only applies to cases when the rent is payable quarterly.—Hemantakumari *v.* Jagadindranath I. L. R., 22 Cal. 214, 221. Their Lordships the Privy Council Judges observed in this case.—"It appears there are some arrears which have become due since the Benal Tenancy Act, 1885. The Subordinate Court held that interest was to be calculated monthly on the arrears; but the High Court held that under the provisions of that Act as regards arrears which became due after Act came into force, the interest should be calculated quarterly. It appears to their Lordships that the High Court were wrong, and that the provision in section 67 of the Act on which they relied, only applies to cases when the rent is payable quarterly. Here it is not disputed that the rent is payable monthly, and on rent in arrear it appears to their Lordships that interest ought to be calculated monthly."

A contract to pay a higher rate of interist:—Section 178, sub-section (3), clause (*h*), *post*, declares that nothing in any contract made between a landlord and a tenant after the passing of this Act (Act VIII of 1885) shall affect the provisions of section 67 relating to interest payable on arrears of rent. Neither landlord nor tenant can, after the passing of the Act, in March 1885, contract himself out of the provisions of section 67. But when a tenant holds over, after the expiration of his lease, he does so on the terms of the lease, on the same rent and on the same stipulation as are mentioned in the lease until the parties come to a fresh settlement. There is no general rule of law to the effect that the lease of an agricultural tenant in this country who holds over, must be taken as renewed from year to year, and if any contract is to be implied, it should be taken to have been entered into so soon as the term of the lease expired rather than at the beginning of each year; so where the term of the kabuliyat expired some years before the Bengal Tenancy Act came into operation, *held* in a suit for rent subsequent to the passing of the Act that the tenant who was holding over was liable to pay interest at the kabuliyat rate although the same was in excess of the rate as is allowed by s. 67:—Kishore Lal *v.* The Administrator-General of Bengal, 2 C. W. N., 303. This ruling was, however, not followd in Ali Mamud Paramanik *v.* Bhagabati Debia, 2 C. W. N., 525, and the tenant who held over, and whose lease had expired after the passing of the Act, was found liable to pay interest on arrears only at 12 p. c, p. a., and also in Administrator Gemeral of Bengal *v.* Asraf Ali, I. L. R., 28 Cal., 227, in which the lease of the tenant who held over had expired before the passing of the Act.

Interest payable by a tenant holding over.

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Purchaser liable to pay interest under s. 67:—A tenant had executed a kabuliyat agreeing to pay interest at a higher rate than 12 per cent. the term of the kabuliyat expired in 1884, before the passing of the Tenancy Act, and the tenant continued to occupy the land; in a decree for arrear of rent his holding was put up to sale; the purchaser at this sale was subsequently sued for arrears of rent and it was held that he was liable only for interest at the rate specified in s. 67:—Alim *v.* Satis Chunder I.L.R., 24 Cal., 27 followed in Ali Mahmut *v.* Bagabati, 2 C.W. N., 525. A stipulation for the payment of interest upon arrears of rent is an ordinary incident of a tenancy in this country unless there is something unusual in the stipulation and as a rule it would attach to the tenancy, not only so long as it remains in the possession of the tenant who enters into the stipulation, but would continue to attach to it notwithstanding a sale for arrears of rent, but, though this be so, a stipulation for the payment of interest on an unusual and an exorbitant rate would not be an ordinary incident of a tenancy and would not continue to be attached to the tenancy after a sale for arrears of rent;—Kalinath *v.* Troilucko, 3 C. W. N., 194: I. L. R., 26 Cal. 215 In more recent case it has been held that a stipulation for payment of interest upon arrears of rent is an ordinary incident of a tenancy in this country, unless there is something unusual in the stipulation, and that, as a rule, such a stipulation attaches to the tenancy, with the result that a purchaser of the tenancy would be bound by the stipulation—Raj Narain Mitra *v.* Panna Chand (1902), 7 C. W. N., 203. Where in a kabuliyat for a time uncertain stipulates for the payment of interest from year to year, and that in case there be any default in the payment of any instalment, the tenant will pay interest for the over-due instalment at a certain rate, it was held that it was a contract entered into once for all, and would continue in force so long as the tenancy was not determined. But where the stipulation was for the payment of interest at the exorbitant rate of Rs. 225 per cent. per annum and the landlord was entered into between the landlord and a cultivating raiyat, *held* that the stipulation was not such an incident of tenancy as would continue to be attached to it notwithstanding the sale of the holding for arrears of rent:—Kalinath *v.* Troilucko, 3 C. W. N. 194. Liability of auction-purchaser to pay interest at the rate stipulated in the kabuliyat of his predecessor. *Held* the lease being a subsisting one he bought subject to the lease. Lal Gopal Dutt Chowdhry and others *v.* Manmatha lal Dutt Chowdhry 9 C. W. N., 175 I. L. R. 32 Cal. 258. (F. B.)

Hard and unconscionable bargain:—Where the rate of interest was Rs. 225 per cent. per annum and the agreement was entered into by a landlord with a cultivating tenant, *held* that the case was one in which the rule of law relating to hard and unconscionable bargains enunciated by their Lordships of the Privy Council in Kamini Sundari *v.* Kali Prosunno, I. L. R., 12 Cal., 225 should be applied.—Kalinath *v.* Troilucko, 3 C. W. N., 194; I, L. R.. 26 Cal., 315.

This section controlled by s. 179 *post*:—This section and the provisions of s. 178, sub-section (3), clause (h) are controlled by section 179; accordingly a permanent lease granted by a permanent tenure-holder is not affected by the restriction contained

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in that clause. Consequently the proprietor or a holder of a permanent tenure in a permanently-settled area may make any condition as to interest in such a case.—Atulia Churun *v.* Tulsi Das, 2 C. W. N., 543; Matangini Debi *v.* Mukrura Bibi, 5 C. W. N., 438; F. B., overruling Basantakumar *v.* Promothonath, I. L. R., 26 Cal., 130; 3 C. W. N., 36. Where in a previous suit for rent the Court erroneously held that interest exceeding 12 p. c., perannum was not recoverable from a permanent tenure-holder in a permanently settled area, although the kabuliyat stipulated for the payment of such interest: *held* that in a subsequent suit for rent the erroneous decision in the former suit would not operate as *res-judicata*:—Alimunnissa Chowdhran *v.* Shyma Charun Roy 9 C. W. N., 466.

Interest on enhanced rent:—A tenant is not liable for interest for enhanced rent unless it is determined:—Raj Mohun *v.* Anund Chunder, 10 W. R., 166, see also Golam Ali *v.* Babu Gopal Lall, 1 W. R.,; 56; Sumeera *v.* Babu Gopal Lall, 1 W. R., 58, but see Khajah Ahsanullah *v.* Aftabuddin, 3 C. L. R., 382, and Dayamayee *v.* Bhola Nath, 6 W. R., Act X, p. 77.

Damage bars interest:—When damages are awarded, no interest can be allowed; see the proviso of the next section. When therefore the Courts would like to reduce the rate of interest or to enhance it, they may allow damage instead of interest, and as to the amount of the damage it is in the discretion of the Court to vary it within the limit of twenty-five per cent. Interest can under no circumstances be awarded where the plaintiff has obtained damages under s. 68; for such damages are given in lieu of interest and can only be decreed in addition to rents and costs.—(Nobo Kanta *v.* Raja Barada Kanta, 1 W. R., 100.)

In a suit for rent due on a mokurari tenure held by the defendant the defence was that he was entitled to set off against the plaintiff's claim certain sum due to him on a decree passed by the Privy Council between the same parties, *held* that having regard to the pendency of the above decree against the plaintiff and the fact that during the years in suit defendant had paid considerable sums of money to the plaintiff as rent, that the plaintiff was entitled only to the ordinary rate of interest at 12 p. c., per annum from the end of each quarter in which the instalment fell due and not to damages.—Bharath Prosad Sahi *v.* Rameswar Koer. 8 C. W. N., 118.

Interest payable inspite of tender, if no deposit made:—Where rent was tendered to the plaintiff's am-mukhtear, but the plaintiff refused to accept it, it was *held* that the defendant was liable to pay interest on arrears in spite of such tender, because he omitted to take advantage of the procedure provided by section 61 for the deposit of rent in Court.—Ransgit Singha *v.* Bhagabutty Charan Roy (1900), 7 C. W. N., 720.

Power to award damages on rent withheld without reasonable cause, or to defendant improperly sued for rent.

68. (1) If, in any suit brought for the recovery of rent, it appears to the Court that the defendant has, without reasonable or probable cause, neglected or refused to pay the amount of rent due by him, the Court may award to the plaintiff, in addition to the amount decreed

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for rent and costs, such damages, not exceeding twenty-five per centum on the amount of rent decreed, as it thinks fit:

Provided that interest shall not be decreed when damages are awarded under this section.

(2) If, in any suit brought for the recovery of arrears of rent, it appears to the Court that the plaintiff has instituted the suit without reasonable or probable cause, the Court may award to the defendant, by way of damages, such sum, not exceeding twenty-five per centum on the whole amount claimed by the plaintiff, as it thinks fit.

Old Act:—See sections 44 and 45 of Bengal Act VIII of 1869.

Without reasonable or probable cause:—The damages are awardable under this section only when the Court specially finds that the defendant has without reasonable or probable cause neglected or refused to pay the amount due by him. It has been held that the mere pendency of an enhancement suit cannot of itself be an excuse for withholding from paying what is admittedly due, *viz.*, the old rent. The damages under this section are awardable in addition only to *rent and costs*, and are to be regarded as in substitution for, and not in addition to, the interest awardable under s. 21 of this Act.—(Nobo Kant Dey *v.* Raja Boroda Kant, 1 W. R., 100.)

A man is not liable to damages, merely because he may from poverty, illness or some other unavoidable cause, have failed to pay his rent.—(Huro Mohan *v.* Umesh Chunder, 1 R. J., P. J., 117.)

The Court may award:—The power to award damages on arrears of rent is within the discretion of Court.—(Zumeeruddinnesa Khanum *v.* Clement Phillipe, 1 W. R., 290.) "The award of additional damages," observed Trevor, J., "is discretionary and not imperative on the Courts, ond before awarding these damages the Court, in the exercise of its discretion, must look to the condition of the parties, and the particular hardship inflicted on the landlord by the omission of the under-tenant to pay his rents, before it will call into action the penal terms of this section."—(Ram Bodhun *v.* Rani Sree Konowar, Sp. W. R., Act X, 22.) In a suit for rent in kind plaintiff is not entitled to damages at a higher rate than 25 p. c., under this section.—Apurba Krishna Roy *v.* Asutosh Dutt 9 C. W. N., 122. As it is clearly discretionary to award such damages, the refusal to award them is not a ground for special appeal though its award is.—(Maharajah Dheeraj Mahtab Chand Bahadur *v.* Debendranath Thakoor, Sp. W. R., Act X, 68; Gopal Lal *v.* Mahomed Kadir, *ibid.*, 73.)

Proviso:—See Nobo Kant Dey *v.* Raja Baroda Kant 1 W. R., 100. The proviso to sub-section (1) provides that interest is not to be decreed when damages are awarded. The damages represent the sum which the plaintiff is allowed in lieu

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of interest up to the date of suit: their award does not interfere with the interest which under sec. 68 may be allowed subsequently to that date, and would certainly not prevent the Court from allowing interest from tne date of decree—(Watson *v.* Srikrishna Bhumik, I. L. R., 21 Cal., 132).

Penalty on the landlord:—The Act has substituted the word 'damages' for 'compensation' which occurred in the old law. Before imposing penalty as prescribed by this section Court should carefully weigh the evidence, and assign reasons why it thinks that arrears are not due, and that the plaintiff has instituted the suit against the defendant without reasonable or probable cause. An Appellate Court has authority to award damages under this section if it finds, after considering the whole evidence that there are no grounds whatever for plaintiff's case.—(Ram Chunder *v.* Dagor Khan, 10 W. R., 339.)

Interest on cesses:—Damage and interest are recoverable upon road-cess and public-cess also. Section 47 of Act IX of 1880 B. C. (25 of Act X of 1871) prescribed that the road-cess is recoverable in the same manner and under the same penalties as if the same were arrears of rent; see also s. 3 (5) of this Act, where rent is defined to include cesses for the purposes of ss. 53—58.—(Saroda Persad *v.* Prosunno Kumar, I. L. R., 8 Cal., 290.)

Limitation:—The period of limitation in suits for arrears of rent is three years from the last day of the year in which the arrear fell due [Sched. III, Part I, art 2, (b)]. Applications for decrees made under this Act, if for sums not exceeding Rs. 500, are barred, if not presented whihin three years of the date of the final decree (Sched. III, Part III, art. 6).

Produce-rents.

Order for appraising or dividing produce.

69. (1) Where rent is taken by appraisement or division of the produce,—

(*a*) if either the landlord or the tenant neglects to attend, either personally or by agent, at the proper time for making the appraisement or division, or

(*b*) if there is a dispute about the quantity, value or division of the produce.

the Colloctor may, on the application of either party, and on his depositing such sum on account of expenses as the Collector may require, make an order appointing such officer as he thinks fit to appraise or divide the produce.

(2) The Collector may, without such an application, make the like order in any case where in the opinion of the District or Sub-divisional Magistrate the making of the order would be likely to prevent a breach of the peace.

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(3) Where a Collector makes an order under this section, he may, by order, prohibit the removal of the produce until the appraisement or division has been effected.

Extended to Orissa, (Not., Sept., 10th, 1891).

By appraisement or division :—"Raiyati tenures in Behar are classified on various principles. One classification is made with reference to the length of the raiyati holdings; another with reference to the incident of the place of residence of the raiyats, and a third with reference to the mode of payment of rent. Uuder the last method all raiyati-holdings are divided into two classes, *viz.*, Nukdi and Bhaoli When the payment of rent is made in cash, the tenure is called Nukdi (from *nukdi*, cash). When the payment is made in kind the tenure is called Bhaoli (probably a Hindi compound made up of *bhow*, rate, price, and *wali*, pertaining to). The Nukdi tenures are of several classes known by distinct names; the most important of them being Nukdi proper, Balkut and Hustbood. The tenure is called Nukdi proper or Chikkut when the cash rent fixed previously is paid for every bigha of the holding without any regard to the produce. The Balkut (from *bal*, ears of corn, and *katna*, to cut) is the kind of tenure where the rate or cash rent per bigha is determined on an inspection of the actual produce of the fields and this rate charged for every bigha of the raiyat's holding. The Hustood is the kind of tenure when the rate of rent is fixed previously; but the raiyats are liable to pay rent at that rate for those plots of land only where the harvests grow. Thus if a raiyat holds twenty bighas of land, and the tenure is Nukdi, the amount of rent, the rate of which must in this case have been fixed previously, say rupees 5 per bigha, would be 100 rupees; but if the raiyat held the same quantity of land in Balkut tenure, the rate of rent would be determined only after an inspection of the actual produce of any one harvest, and supposing the rate then to be determined at Rs. 6 per bigha in one year the amount of rent would be Rs. 120, and supposing the rate to be determined at Rs. 4 the next year, the amount would be Rs. 80. And if the rate of rent be at 5 rupees per bigha, and Khariff has grown in 8 out of 20 bighas, and Rabbi in 4 out of 20, the amount of rent payable, in case the tenure is Hustbood, would be Rs. 65, and if in another year, Khariff grows in 12 bighas and Rabbi in 13, the amount of rent payable is Rs. 120, and this irrespective of the amount of produce. There is another kind of Hustbood tenure which is peculiar to certain pergunnas, and in this there is a combination of the two kinds of payment. Thus a Nukdi rental is previously agreed on, and it is understood that certain percentage of the raiyat's holding is to be held in Nukdi, and the remainder in Bhaoli Agorbatai. The raiyat has in this case the right to select the best lands called Joiet (best) for the Nukdi payment. Except the Nukdi proper, the other modes of Nukdi payment are sometimes reckoned as Bhaoli.

"The Bhaoli tenure is of two kinds: (1) Agorbatai, (2) Danabandi. Agorbatai (from *agora*, watching, and *batna*, dividing) is that kind of Bhaoli tenure where a division of the crops is made in predetermined proportions between the landlord and the tenant. When the crops are yet in the field and ready for reaping, the landlord

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appoints *agoras* (watchmen) to watch that none of the crops are fraudulently made away with. When ripe, the crops are gathered in the khalihans (threshing-floors) which are places usually set apart for this purpose near the basti. The charge of reaping, (one out of twenty-one bundles gathered) is paid out of the entire produce, and the remainder then, after threshing and cleansing, is divided in predetermined proportions between the landlord and the tenant. The usual proportion is half and half; or 9 annas to the landlord and 7 annas to the tenant out of the 16 annas' produce. The Danabandi literally means a cursory survey or partial measurement of field, or weighing of the crop, to ascertain the value of the crop and the amount of assessment. These proceedings, which are antecedent to the final determination of the landlord's portion, give the name to the tenure itself. The Danabandi is made when the crops are yet standing in the fields and when they are almost ripe for cutting. A party consisting of a salis (arbitrator), an amin (appraiser), attended by the patwari, gomashta and other village amlas, go about in each field and appraise the produce in maunds. At first the salis makes the estimate, but if the raiyat is dissatisfied with the estimate, the Amin is referred to. The estimate having been once made, everything is left to the raiyat himself; the landlord or his amla has then nothing to do with the standing crops. They are reaped and gathered by the raiyat who may pay the zemindary portion of the estimated produce either in kind, or the price of this according to the price current, in cash. The zemindar's share is usually either half or 9 annas out of the 16 annas of the produce. The Baitadana is merely a modification of the last mentioned method, the difference being that under this system the salis and the amin do not go to the field to appraise the out-turn, but the landlord's amla and the raiyat come to an understanding about this at a sitting in the zemindar's kutchery.

"There is a kind of *Danabundi* which is called either *Khara* or *Baita Danabundi*, where the estimate is made in the zemindar's kutchery without going to the field."—(*The Memorial of the Behar Landholder's Association.*)

"Under the *Agorebatai system*, the landlord employs men to which his share of the crop when it approches maturity and when it is ready, cuts and carries it himself. In a more common variety of the same tenure, the crop is cut and threshed by the raiyat under the superintendence of the zemindar's servants, and the produce divided on the threshing-floor; but it is also matter of arrangement between the parties in this case, whether the landord shall have straw or only the grain, and whether it shall be delivered at the threshing-floor of the raiyats' village or at some other place more convenient to the zemindar. Under the Bhaoli or Danabundi system, when the crop is ripe, the patwari, the gomastha, the ameen, or jureebkush or measurer, a salis or arbitrator, and a navisunda or writer, of the village, with the raiyat himself proceed to the field in which the crop is growing. The salis first makes an estimate of the produce, the amin then makes another. If the two estimates agree, the matter is considered settled. If they differ, the raiyat cuts a cotta where the crop is thinnest; the zemindar's people cut another where it is heaviest. The

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produce is threshed out, mixed together and and weighed, and the produce of the whole field is estimated from this sample. A memorandum of the result, called a Danabandi, is made out by the patwari and his writer, and signed by those present. The raiyat is then at liberty to cut and store his grain. The putwari next prepares a paper called a 'Behree' showing the amount of grain in the possession of the raiyat, and the respective shares of the malik and the raiyat, and sends for the malik's share, which the raiyat either pays in grain or money, as may have been agreed upon. If the agreement is to pay in money, the gumastha writes to the amla of the surrounding villages for the nirik or the market rate, which is returned on the back of his letter, and an average is then struck. It will thus be seen that accounts of the estimate of the crop and its weighment form the chief evidence in these Bhaoli cases, and that a juma-wasil account is of comparatively little use.—(*Letter of the Commissioner of Patna to the Secretary of the Board of Revenue, No. 1130 of the 21st August 1858.*)

"When the tenure is *bhaoli*, that is when the rent is paid in kind, the tenant receives no *pottah*, but may be ejected after any harvest. *Bhaoli* tenure is either *danabandi* or *agorebatai*. In both cases the Collector and the proprietor theoretically share the produce in equal moieties; but in neither case does the cultivator really obtain more than one-third of the crop, while sometimes his share is even less than this. When the tenure is *danabandi*, the crops are assessed just before they come to maturity by the *gomashta* or *amin*, assisted by the village accountant (*patwari*), and the bailiff (*barahil*). The cultivator suffers from the corruptness of these agents, who either over-estimate the probable out-turn, or else demand heavy bribes for making a fair estimate. Supposing the real out-turn to be sixteen *mauuds*, the estimate will make it eighteen. The landlord will then get *nine maunds* as his half, and another *maund* on some pretext or other. The cultivator will thus be left with six maunds; but out of this he will have to fee the *gomasta*, the *patwari*, the *barahil* &c., with fixed percentage of his share, till finally, he may think himself fortunate if he carries off five of the sixteen *maunds* as his own half of the produce. When the tenure is *agorebatai*, the cultivator fares perhaps a little better. The actual out-turns of the crops is divided; and though the cultivator has to give the usual fees (abwabs) to the landowner and his agents still he gets a larger share of the produce." (*Dr. Hunter's Statistical Accounts of Patna*, pp. 126-127).

Mr. Edward Colebrooke, writing in 1819 and epitomizing the reports of 14 Collectors in the North-Western Provinces, says: "It will appear that for the most valuable articles of culture in all the districts and for every sort of produce in some districts money rents obtain universally, and that the tenures in kind under the several denominations Umli, Bhaoli, and Battai prevail only for the inferior sorts of grain, and in those districts or those particular parganas, where, from the nature of the soil, the want of means for artificial irrigation, and the consequent dependence on the uncertainty of seasons, the tenants are not disposed to subject themselves to a certain payment. * * * The proportion of the crop whether taken by the landholders in kind or commuted for its value in money, is regulated by custom

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which varies according to the nature of the soil from one-fouth and less in lands newly reclaimed to one-half in lands under full cultivation. * * * With regard to the nukdi tenures or money rents they are found to be regulated in only few parts of these provinces by established pargana rates. In general they appear to be annually adjusted by mutual agreement. The tenants themselves are stated to be averse from binding themselves to a fixed payment beyond the current year in consequence of the uncertainty of the seasons."—(*Letter to Governor-General, dated the 5th January* 1819). In the Rai-raiyan's answer (*Appendix No. 17 to Mr. Shore's Minute*), it is stated that in the Subah of Bengal, the raiyats always paid their rent in money—that the crop of khamar land is usually divided between the zeminders and raiyats in equal proportion, though in some places the latter get more and in other less: but for this fluctuation there is no specific rule; that in the Subah of Behar custom has established the share of the zemindar 22½ seers; and that of the raiyat at 17½; but variation from these proportions occasionally occurs. Even when rents were agreed to be paid in kind, it was very common for the zemindars to commute his share for a money payment, the commutation price being adjusted while the crops were still on the ground—(*Mr. Holt Mackenzie's Minute, section* 428). The North-Western Provinces' Land Revenue, Act. XIX of 1873, empowers settlement officers, to commute these rents for a fixed money rent (sections 73-74). The Oudh Rent Act XIX of 1868 contains similar provisions (section 28). *Vide* section 40 of this Act.

The Collector:—See the definition of Collector in cl. (16) of s. 3. He must be either the Collector of the district or an officer empowered under this section to discharge the function of a Collector. By a notification, dated 21st April, 1886, published in the *Calcutta Gazette* of the 28th idem, Part 1, p. 466, all officers in charge of sub-divisions were invested with the powers of a Collector for the purpose of discharging the functions of a Collector under sections 69 to 71 of this Act. By a notification, dated 28th May, 1886. published in the *Calcutta Gazette* of the 2nd June, 1886, Part 1, p. 652, the Deputy Collector of Howrah, and by a notification, dated the 4th May, 1893, published in the *Calcutta Gazette* of the 5th idem, Part 1 p. 274, the Deputy Collector attached to the *sadar* station of Gaya, were invested with powers of a Collector for the purpose of discharging the functions referred to in these sections.

Sanction for prosecution:—A Collector acting under this and the following section is a "Court" within the meaning of sec. 195 of the Criminal Procedure Code, and his sanction is necessary to the prosecution under secs. 465 and 471 of the Penal Code of tenants who had filed rent receipts alleged to be forgeries in certain appraisement proceedings before him.—Raghubans Sahai *v.* Kokil Singh, I. L. R., 17 Cal., 872. But a person nominated by the Collector under this section for the purpose of making a division of crops between the landlord and tenant is not a "public servant" within the meaning of section 186 of the Penal Code.—Chattar Lall *v.* Thakur Prasad, I. L. R., 18 Cal., 518.

Amin not a public servant:—A person nominated by the Collector under s. 69 of the B. T. Act for the purpose of making a division of crops between the landlord and the tenant, is not a public servant within the meaning of s. 186 of the Penal Code.—

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Chatter Lall *v.* Thacoor Pershad, I. L. R., 18 Cal., 518.

Likely to prevent a breach of the peace :—The grounds for the belief of the Sub-divisional Magistrate as to the existence of a likelihood of a breach of the peace must be recorded.—In the matter of the petition of Kumudnarain Bhoop, I. L. R., 4 Cal., 650.

Bona fide dispute as to the nature of rent :—Where there is a boná fide dispute as to the nature of the rent, *i.e.*, whether it is *bhaoli* or *nakdi*, the Deputy Collector has no jurisdiction to proceed under the provisions of ss. 69 and 70 :—Nukheda Singh *v.* Ripu Mardan, 4 C. W. N. 239.)

Application by a co-sharer landlord :—An application under this section cannot be made by some only of a body of landlords, such an application being authorised by the provisions of this Act and not by those of the Civil Procedure Code :—Nukheda Singh *v.* Ripu Mardan, 4 C. W. N., 239.

Suit for produce rent :—A suit for produce rent or its money value is a suit for rent under this Act and not a suit for damages for breach of contract, and therefore is not cognizabale by a Provincial Small Cause Court :—(Shoma Mehta *v.* Rajani Biswas, 1 C. W. N., 55 ; see also Tajuddin *v.* Ram Parshad, 1 All. 217 ; Luchman *v.* Kailash, 11 W.R. 151 ; 2 B. L. R. App. 27; Mallik *v.* Aklu, 25 W. R., 140, Jamna *v.* Guni, 21 W. R. 124.) The fact that a landlord sues, not to recover the crop itself, but its money value with interest, does not withdraw the suit from the category of rent suits :—Krishto Bundhoo *v.* Rotish, 25 W. R., 307. See also the case of Sreenath *v.* Dwary, S. C. C. Ref. 113.

Refusal of landlord to accept rent in kind :—A landlord refused to accept rent in kind as he was suing for a money rent, *held* that on the dismissal of his suit the landlord could not sue for the money value :—Mohunt Narain *v.* Gour Saran, 23 W. R., 368.

Right to sue to set aside wrongful distraint :—Where the landlord, under exceptional circumstances, supplied the seed and the agreement was, that the tenants would cut and store the crop on his *chuck* and after the threshing, division was to be made between the landlord and the cultivators ; *held*, that the dominion over the crop was with the landlord, and if that crop had been cut by some one else under cover of the law of distraint, the landlord was entitled to sue to contest the demand of the distrainor : Harro Narain *v.* Shoodha Krishto I. L. R., 4 Cal., 893 ; s. c. 4 C. L. R., 32.

Dominion over crops cut.

No stamp duty leviable:—Art. 4, Sched. II, Act I of 1879, exempts from stamp duty an appraisement of crops for the purpose of ascertaining the amount to be given to a landlord as rent.

Notice:—Section 69 makes no provision for the giving of notice to the opposite party before making an order appointing an officer to make an appraisement, but an officer so appointed must give to the opposite party notice of the time and place at which the appraisement or division will be made.– Under the old law, however, it was held in a suit for bhaoli rent where the quantity of land was disputed, and the landlord produced as evidence a khusra or appraisement of the land that it was not necessary for

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him to show that the estimate was drawn up in defendant's presence and acknowledged by him, but only that defendant had notice when the khusra was about to be made.—(Huree Narain v. Baljeet Jha, 24 W. R., 125.)

Suit against depositary:—Sections 69 and 70 refer to and contemplate proceedings between the landlord and the tenant, and consequently where, in the course of certain proceedings under these sections, an *amin* was deputed to appraise and divide the crops raised by a tenant, and he, upon the refusal of the landlord to take his share, deposited the same, uuder the orders of the Collector, with the defendants, who executed a receipt for the same and delivered it to the *amin*—upon a suit by the landlord to recover from the defendants the value of the crops deposited with them, it was held that the suit was not barred under the provisions of the Bengal Tenancy Act, and that the receipt executed by the defendants established privity between them and the plaintiff—Gajat Sing v. Chooa Sing. I. L. R. 22 Cal., 480.

Procedure where officer appointed.

70. (1) When a Collector appoints an officer under the last foregoing section, the Collector may, in his discretion, direct the officer to associate with himself any other persons as assessors, and may give him instructions regarding the number, qualifications and mode of selection of those assessors (if any), and the procedure to be followed in making the appraisement or division; and the officer shall conform to the instructions so given.

(2) The officer shall, before making an appraisement or division, give notice to the landlord and tenant of the time and place at which the appraisement or division will be made; but if either the landlord or the tenant fails to attend either personally or by agent, he may proceed *ex-parte*.

(3) When the officer has made the appraisement or division, he shall submit a report of his proceedings to the Collector.

(4) The Collector shall consider the report, and, after giving the parties an opportunity of being heard and making such enquiry (if any) as he may think necessary, shall pass such order thereon as he thinks just.

(5) The Collector may, if he thinks fit, refer any question in dispute between the parties for the decision of a Civil Court but, subject as aforesaid, his order shall be final, and shall, on application to a Civil Court by the landlord or the tenant, be enforceable as a decree.

(6) Where the officer makes an appraisement, the

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appraisement papers shall be filed in the Collector's office.

"We have empowered the Collector, in all cases, to pass such order as he thinks just on the report of the officer deputed, and have provided that his order shall be final and be enforceable as a decree, unless he thinks fit to refer any question in dispute between the parties for the decision of a Civil Court. This seems to us a simpler and more convenient procedure, than leaving the parties to seek redress in the Civil Court, *in the first instance*, as under the original Bill." (R. S. C., III.)

Assessors:—Tne association of assessors is in accordance with the indigent custom of the country under the Danabundi system. See notes under s. 69 *ante*.

Sub-section (5):—The procedure is meant to be summary and is therefore open to a regular suit in Civil Court. 'Final' means *not appealable*. It could not have been the intention of the Legislature to vest the Collector with power to determine the proportion of division of crops finally in the sense of being not open to regular suit. But the order of the Collector will be enforceable as a decree. Where there is a bonafide dispute as to the notice of the rent, the Collector has no jurisdiction to proceed under the provisions of ss. 69 and 70.—(Nakheda Sing *v.* Ripu Mardan, 4 C. W. N., 239. This sub-section does not bar a suit by a tenant against a third party for recovery of crops awarded to the latter by the Collector.—Chhedi v. Chhedan : I. L. R., 32 Cal., 422.

Right and liabilities as to possession of crop.

71. (1) Where rent is taken by appraisement of the produce, the tenant shall be entitled to the exclusive possession of the produce.

(2) Where rent is taken by division of the produce, the tenant shall be entitled to the exclusive possession of the whole produce until it is divided, but shall not be entitled to remove any portion of the produce from the threshing-floor at such a time or in such a manner as to prevent the due division thereof at the proper time.

(3) In either case the tenant shall be entitled to cut and harvest the produce in due course of husbandry without any interference on the part of the landlord.

(4) If the tenant removes any portion of the produce at such a time or in such a manner as to prevent the due appraisement or division thereof at the proper time, the produce shall be deemed to have been as full as the fullest crop of the same description appraised in the neighbourhood on similar land

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for that harvest.

Extended to Orissa, (Not., Sept. 10th, 1891).

Under this section the tenant is entitled to exclusive possession of the produce, and section 186 (*c*), *post*, provides that any person who except with the consent of the tenant, prevents or attempts to prevent the reaping, gathering, storing removing or otherwise dealing with any produce of a holding shall be deemed to have committed criminal trespass within the meaning of the Indian Penal Code.

Jurisdiction of the Civil Court:—In a suit by the raiyats to have the kharif crop of certain bhaoli lands "reaped and threshed through an officer of the Court, and the grain, after deduction of the remuneration of the labourer," divided between the plaintiff and defendants (landlords) in equal shares, it was objected on behalf of the latter that, as the raiyats had already applied to the Collector under sections 69 and 70 of the Bengal Tenancy Act, the action was not maintainable. The High Court, overruling the objection of the defendants, held that the jurisdiction of the Civil Court was superior to that of the Collector under sections 69 and 70 of the Bengal Tenancy Act; and that, so long as no final order has been passed by the Collector in proceedings instituted under those sections, it was quite competent to the Civil Court to proceed with a suit involving the decision of the same question and, if necessary, direct the Collector to stay his hands. And it was further held that "there was nothing in the Bengal Tenancy Act to show that the provisions of the Civil Procedure Code relating to the taking charge of property in dispute for its preservation, and to the appointment of receivers, were not applicable, under section 143 of that Act, to suits between landlord and tenant."—Hirman Sing *v.* Musstt Fuzalunnesa, S. A. 1560-1582 of 1888 decided on the 22nd July 1889 (Banerji and Rampini, J. J.)

Fullest crop:—In a suit to recover bhaoli rent, the damage to the plaintiff was held to be the value of the crops at the time they were due and not subsequently.—(Luchmun Persad *v.* Hoolas Mahtoon, 11 W. R., 151; Kristo Bundhu *v.* Rotish Shaik 25 W. R., 307.)

Liability for rent on change of landlord or after transfer of tenure or holding.

72. (1) A tenant shall not, when his landlord's interest is transferred, be liable to the transferee for rent which became due after the transfer, and was paid to the landlord whose interest was so transferred, unless the transferee has before the payment given notice of the transfer to the tenant.

Tenant not liable to transferee of landlord's interest for rent paid to former landlord, without notice of the transfer.

(2) Where there is more than one tenant paying rent to the landlord whose interest is transferred, a general notice

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from the transferee to the tenants published in the prescribed manner shall be a sufficient notice for the purpose of this section.

Sub-section (1): when the landlord's interest is transferred:—It should be observed that this section applies only when the tenant *has paid his rent* to the original landlord without notice of the transfer. Where, however, the tenant has *not paid* his *rent* to the former landlord, the transferee is entitled to recover it from him, the question of costs will still depend upon a prior notice or otherwise. If on the other hand, after having notice of the transfer, the tenant chooses to pay his rent to the former landlord, he does so at his risk and cannot plead such payment in amount in suit for rent by the new landlord. (The Collector of Rajshahye *v.* Hara Sundari, Sp., W. R., Act X, 6). The same rule applies when tenants continue to pay rent to co-sharer landlords after notice that a third paty has acquired a share.—Azin *v.* Ramlal, I. L. R., 25 Cal. 330. But if he had no notice, actual or symbolical, he is justified in paying rent to the old landlord.—(Thakurdas *v.* Pitambur, S. D. A., 1859, 820.) When a tenant holding under several co-sharers had been accustomed to pay his rent jointly, and was sued by the assignee of the intrest of one of the co-sharers, and it was found that he had paid the rent due for that share, in accordance with that practice, to the co-sharers as a body, which payment was admitted by them, it was *held* that he was exempted from liability.—Ahmuddin *v.* Greesh Chandra, I. L. R., 4 Cal. 350; See also Jadoo *v.* Kadambini I. L. R., 7 Cal., 150. The word 'transfer' includes not only sale, gift or the like, but also mortgage or lease.—See definition of these terms in the Transfer of Property Act. When a tenant pays rent to his landlord, without knowing that he has created an intermediate tenure, he is not bound to pay it again to the intermediate holder.—(Sheik Attapayi *v.* Sheikwat, Marsh., 102; Nilmani v. Hills, 4 W. R., Act X, 38. Mansur Ahmed *v.* Azzuddin W. R. Sp. Act X, 129. A parcel of land being a portion of a patni can be sold in execution of a decree against the patnidar and the tenant will be liable to pay rent to the purchaser after receipt of notice of the purchase.—Madhubram *v.* Doyal Chandra 2 C. W. N., 108, I. L. R., 25 Cal, 445. There is a similar provision in the Transfer of Property Act.: "If the lessor transfer the property leased. or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights, and, if the lessee so elects. be subject to all the liabilities of the lessor as the property or part transferred so long as he is the owner of it; but the lesssor shall not, by reason only of such transfer, cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him; provided that the transferee is not entitled to arrears of rent due before the transfer, and that, if the lessee not having reason to believe that such transfer has been made, pays rent to the lessor, the lessee shall not be liable to pay such rent over again to the transferee. The lessor, the transferee and the lessee may determine what portion of the premium or rent reserved by the lease is payable in respect of the part so transferred, and, in case they disagree, such determination may be made by any Court having jurisdiction to entertain a suit for the possession of the property leased." (Section 9.) See also

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s. 50 of the Transfer of Property Act.

Rent paid or assigned in advance :—Where the tenant pays the rent to his landlord in good faith before it has become due, and the landlord transfers his proprietary interest, the transferee would be entitled to recover the amount so paid from his transferor.—Madan Mohan *v.* Hollway, I. L. R., 12 Cal., 555. And this would especially be the case where the assignee takes the property with knowledge of the fact that the tenant has paid in advance certain debts which only became due after the date of purchase ; under such circumstances the assignee would have no right of recovery against the tenant.—Ramlal *v.* Jugadish, 18 W. R., 328. Similarly, if he has notice of any contract between his transferor and the tenant, by which the latter is entitled to hold the rent payable by him.—Churaman *v.* Patu Kuar, 24 W. R., 68.

Suit for assigned rent is suit for rent :—A suit brought by an assignee of arrears of rent after they fell due, for the recovery of the amount due, is a suit for rent, and is therefore excepted from the cognizance of the Court of Small Causes.—Krish Chandra *v.* Nachin Kazi, I. L. R., 27 Cal., 827. Under sec. 148 (h) execution of a decree for arrears of rent cannot be taken out by an assignee, unless the landlord's interest in the land has become and is vested in him.—Dinonath De *v.* Golap Mohini Dasi, 1 C. W. N., 183.

Time from which the title of the transferee dates :—Section 8 of the Transfer of Property Act provides :—" Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof : such incidents include, where the property is, land or house, the rents * * * accruing after the transfer." So section 36 of the same Act provides : " In the absence of a contract or local usage to the contrary, all rents shall, upon the transfer of the interest of the person entitled to receive such payments, be deemed, as between the transferor and the transferee, to accrue due from day to day and to be apportionable accordingly, but to be payable on the days appointed for the payment thereof." Similarly it has been held that the title of an auction-purchaser under a decree relates back to the date of sale, although the sale may not have been confirmed until long afterwards :—(Kali Das *v.* Hur Nath, W. R., Gap. No. 1864, 279). But in Bipin Bihari v. Jadu Nath, 21 W. R., 37, it was held that the title of the purchaser accrued from the date of the confirmation of sale. The question was settled by the Full Bench in Bhyrub Chunder *v.* Soudamini, I. L. R., 2 Cal., 141, which held that the title of the purchaser accrued from the date of sale, and that on the confirmation of the sale, the share purchased must be considered to have vested in the purchaser from the date of sale. This case was followed in Ramesvarnath *v.* Mewar Jugjeet, I. L. R., 11 Cal., 341. Section 316 of the Civil Procedure Code, however, has brought about a change : It provides : " When a sale of immoveable property has become absolute in the manner aforesaid, the Court shall grant a certificate stating the property sold and the name of the person who at the time of the sale is declared to be the purchaser. Such certificate

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shall bear the date of the confirmation of the sale, and so far as regards the parties to the suit, and persons claiming under or through them, the title to the property sold shall vest in the purchaser, *from the date of such certificate and not before*: provided that the decree under which the sale took place was still subsisting at that date." But in the interval between the sale and the confirmation of the sale, there is not merely a contract for sale, but an inchoate transfer of title which only requires confirmation to perfect it—(Pran Gour *v.* Hemanta Kumari I. L. R., 12 Cal., 597). In a sale for arrear of revenue the transfer dates from the time the sale becomes final in conclusion. See section 28 of Act XI of 1859.

Accrual of rent.

Under the Bengal Tenancy Act rent should "ordinarily" be regarded not as accruing from day to day but as falling due at stated times according to the contract of tenancy, or according to the general law, in the absence of such a contract.—Satyendra Nath *v.* Nilkantha, I. L. R., 21 Cal., 383. Accordingly where a tenure was put up to sale and purchased by the defendant, and the landlord brought a suit for rent for a period previous to the confirmation of sale and before the title of the purchaser had become perfected, it was held that he was entitled to recover the entire amount of the instalment which fell due after that date.—*Ibid.* When a landlord has brought a tenure to sale in execution of a decree for arrears of rent, the purchaser becomes his tenant only from the date of the confirmation of the sale, and the arrears accruing due between the date of sale aud the date of confirmation of sale must be treated as arrears of rent payable by the out-going tenant, whose interest does not cease till the sale is confirmed.—(Karunamai Banurji *v.* Surendro Nath Mukhurji, 2 C. W. N., cccxxvii).

Apportionment of rent:—When the subject of the transfer or division is a revenue-paying estate, the Estate's Partition Act V., B. C. of 1897, ss. 81 & 83 provide rules for the apportionment of the rent of the tenants, whose lands fall partly within one share and partly within another. But when the subject of transfer is a revenue-free land or tenure or under-tenure, and partial transfers take place, the tenant's rent should be apportioned by a suit in the Civil Courts. There is no provision in this Act for apportionment of rent. In Beni Madhub *v.* Thakur Da, B. L. R., Sup., 588, Peacock.C. J., said: "It appears that the tenant originally held under 4 brothers, of whom Govinda Moni's husband Srikishen was one. They were a joint family, and the tenant was paying rent to them jointly. I should have thought myself, though it is unnecessary to express any decision on the point, that when rent is received by a joint family, the tenant is not liable to be sued by each member of the joint family for a separate share of the rent. But if the estate is severed by partition, and instead of being a joint estate becomes separate estates, then the rent would be apportioned in respect of the several allotments, and each member would be entitled to sue for his separate share of the rent in respect of the lands allotted to him on partition."—(See Sreenath *v.* Mohesh, 1 C. L. R., 453; Annoda Churan *v.* Kali Kumar, I. L. R., 4 Cal., 89.) In Issur Chunder *v.* Ram Krishna, I. L. R., 5 Cal., 902, the Full Bench observed: "A sale of a share in a tenure which has

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been let out to a tenant in its entirety does not of itself necessarily affect a severance of the tenure or an apportionment of the rent, but if the purchaser of the share desires to have such a severance or apportionment, he is entitled te enforce it by taking proper steps for that purpose. If he takes no such steps, then the tenant is justified in paying the entire rent, as before to all the parties jointly interested to it. But if purchaser desires to effect a severance of the tenure, and an apportionment of the rent, he must give the tenant due notice to that effect, and then, if an amicable arrangement of the rent cannot be made by arrangement between all parties, the purchaser may bring a suit against the tenant for the purpose of having the rent apportioned, making all the co-shares parties to the suit." In Durga Prosad *v.* Ghasita, I. L. R., 11 Cal., 284, the plaintiff held a jote under the defendant and thier co-sharers, who were jointly in possession of an estate paying revenue to Government. In 1877 the estate was partitioned, and out of the lands held by the plaintiff, a plot measuring 15 cottahs. was allotted to the defendants as their share. It was not disputed that the rent payable in respect of the land was at the rate of Rs. 4 per bigah. After the partition the defendants enforced payment from the plaintiff of Rs. 5 and odd on account of the land held by him. The plaintiff therefore instituted the suit, nominally under s. 19, Act VIII B. C. of 1869, for abatement of rent, but really for a declaration that he was only bound to pay rent at the rate of Rs. 4 per bigha for the amount of land held by him. It was held that this was not properly a suit for abatement, but for apportionment and it would lie. When one co-sharer had obtained a decree for his share of the rent separately, and the other co-sharers served notices and sued for apportionment of rent, it was held that there was no reason why the rent should not be apportioned, provided the notice was sufficient.—(Banwari Lal Mitra *v.* Kuladananda Chaudhri, 1 C. W. N. clxxxviii). A decree had determined that lands leased in mukarari to a lessee with a fixed rent thereon, were less in extent than they were specified to be in the pattahs that comprised them, the lessors not having title to the whole, and the lessee had obtained possession of the less estate. The revenue paying mehal, within which were the lands subject to the mukarari, such lands being shares of mauzahs therein, was afterwards sold for arrears under Act XI of 1859. The purchaser at that sale was sued by the mukararidar to make good her incumbrance under sec. 54 of the Act. The lease was maintained by the decree that followed, but only as to part of the shares specified in the pattahs. In a suit for mesne profits brought by the lessee against the purchaser's heir, who filed a cross suit against her for rent, it was held that as the lessee had not proved that she having had possession under the lessee, had been dispossessed by the purchaser, there had not been an eviction in the proper sense of the word. But when in her suit for possession, part only was decreed to her, and she was precluded by the result from getting a substantial part, her position was the same as if she had been evicted. She therefore, had the same equity for an apportionment as if she had been evicted.—(Imambandi Begam *v.* Kamleswari Prasad, I. L. R., 21 Cal., 1005; L. R., 21 I. A., 118). Where the act of the landlord is not a mere trespasser, but something of a graver character interfering substanti-

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ally with the enjoyment by the tenant of the demised property, the tenant is entitled to a suspension of rent during such interference, even though there may not be actual eviction, and if such interference be committed in respect of even a portion of the property, there should be no apportionment of rent, when the whole rent is equally chargeable upon every part of the land. But if the interference is in respect of only a certain portion of the demised property, the rent for which is separately assessed, there should be apportionment.—(Dhanput Singh *v.* Mahomed Kasim Ispahain, I. L. R., 24 Cal., 296). If the lease under which the tenure is held reserves rent at a certain rate per bigha, it cannot be said that each bigha is separately assessed and separately chargeable with rent: so if the landlord dispossesses the tenant from some of the lands of the tenure, he cannyt claim rent for the lands that remain in the tenant's possession.—(Haro Kumari *v.* Purno Chandra Sarbogya I. L. R, 28 Cal., 188). When the plaintiffs, who are joint landlords, have in suits separately instituted by them against the tenant defendant asked for apportionment of rent and for recovery of rents due on such apportionment and all the parties interested have been made parties to the suits, there is no reason why the plaintiffs should not have the rents apportioned, and the apportionment may take place in respect both of the arrears alleged to be due and the future rent.—(Rajnarain Mitra *v.* Ekadasi Bag, I. L. R., 27 Cal., 479; 4 C. W. N., 494). In a suit for apportionment of rent, the plaintiff must make all his co-sharers parties, otherwise the suit is badly framed and should be dismissed.—(Ishar Chandra Dutta *v.* Ram Krishna Das, I. L. R., 5 Cal., 902; 6 C. L. R., 421; Abhai Govind Chaudhri *v.* Hari Charan Chaudhri I. L. R., 8 Cal. 277). A tenant held certain land under a lease which provided that after the land had been fully brought under cultivation, there should be a measurement and an adjustment of the rent finally and once for all, and after that there should be no further change in the rent. One of the landlords then brought a suit alleging that the land had been fully brought under cultivation, and that there had been a measurement, and, therefore, she prayed for an adjustment of her share of the rent. It was held that on the terms of the lease the final adjustment of the rent could be obtained only by a suit brought by all the landlords, or by a suit by some of them, if the others refused to join, but in that case the suit must be for the adjustment of the entire rent and all the necessary parties must be properly before the Court.—(Bindu Bashini Dasi *v.* Piari Mohan Basu, I. L. R., 20 Cal., 107).

All co-sharers must be made parties in a suit for apportionment of rent.

Where a tenant has agreed with his landlords to pay a certain rent for his whole holding, the fact that he has paid each landlord his proportionate share of the rent is not conclusive, but merely presumptive, evidence that the rent has been apportioned between the landlords.—(Anu Mandal *v.* Kamaludin, 1 C. L. R,, 248).

Separate payment of rent not conclusive evidence of apportionment.

Apportionment of cesses:—Where a Collector has under the Cess Act determined the annual value in respect of certain land and a portion of that land is subsequently granted as a tenure to an under-tenant and the Collector has not separately assessed the annual value of the land of the tenure so created, the under

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tenant is nevertheless liable for any cesses in respect of that land. In such a case it is competent to a Court to ascertain the annual value of the land comprised in the defendant's tenure, so as to ascertain the amount due for cesses.—(Hari Mohan Dalal *v.* Ashtosh Dhar, 4 C. W. N., 776).

Notice:—Sub-section 1 of this section does not require that the notice therein contemplated should be given in any particular manner. Rule 3, Ch. I of the rules made by the Local Government under cl. 2 of s. 189 is intended to apply only to those cases where the Act speaks of the service of a notice and not merely the giving of notice; it may apply to cases where the Act speaks of the giving of notice, if such notice is required to be given in the prescribed manner.—Madhub Ram *v.* Dayal Chunder, 2 C. W. N., 109 : I. L. R., 25 Cal. 445. As to the mode of service of notice, see Appendix.

Subsection (2) : Registration of transfer:—"It is no longer compulsory for the *seminlar* to register the names of any tenants in his *sherista*. The Act provides for the official registration of transfers of the rights of permanent tenure-holders and raiyats holding at fixed rates. But the transfers of occupancy-rights are not so registered, and there is no provision of law by which they can be registered in the landlord's sherista. When occupancy rights transferable by custom, have been transferred, it is no doubt open to the transferees to sue under the Specific Relief Act to have it declared that they have acquired certain rights; but it is clear that if it is the object of such a suit, as it apparently was of this suit, to have it declared that the old tenant is no longer responsible for the rent and that the transferee is so responsible to the landlord, such a declaration cannot be obtained without the service of the notice prescribed by s. 73." (*Per* Rampini and Stevens, JJ.) Ambika v. Chowdury Keshri, I. L. R., 24 Cal., 642.

Suit against some of the heirs of the last recorded tenant:—The heirs of the last recorded tenant with respect to an occupancy holding are entitled to claim recognition from the landlord and if the latter, ignoring them, bring a suit for arrears of rent and in execution thereof sell the holding, the right of the former is not affected:—Annada Kumar *v.* Hari Das, 4 C. W. N., 608.

General notice in the prescribed form:—See rule 6 of chapter V of the Local Government rules in the Appendix. It should be observed, however, that sub-section (2) only provides that a general notice in the prescribed form shall be a sufficient notice, but it does not provide that any other mode of publishing a general notice will *not be* sufficient. Hence, if an auction purchaser in execution proceedings takes possession under section 319 of the Civil Procedure Code, and his purchase is proclaimed to the tenants by beat of drum, that will be a sufficient notice: or, if he chooses, he may serve each of the tenants with a written notice of his purchase. Similarly, purchasers of estates for arrears of revenue may proceed under section 29 of Act XI of 1859, and purchasers of patni taluks, for arrears of rent, under section 15, sub-section 2, of Regulation VIII of 1819.

73. When an occupancy-raiyat transfers his holding with-

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Liability for rent after transfer of occupancy-holding.

out the consent of the landlord, the transferor and transferee shall be jointly and severally liable to the landlord for arrears of rent accruing due after the transfer, unless and until notice of the transfer is given to the landlord in the prescribed manner.

When an occupancy-raiyat transfers without consent:—"To meet those cases in which transfer without the landlord's consent is a valid custom, we have provided in s. 73 that, until notice of such transfer is duly served on the landlord, the transferor and the transferee shall be jointly and severally liable for arrears of rent accruing after the transfer." *(S. C. B. III.)* Hence this section applies to cases where the occupancy-holding is transferable by custom, but not to cases where it is not transferable. For effect of transfer of non-transferable occupancy-holdings, see notes under s. 23 pp. 125-136. As to occupancy-holdings transferable by custom, see s. 178 (3) (*d*) and notes. A similar provision appears in s. 108 of the Transfer of Property Act: "In the absence of a contract or local usage to the contrary, the lessor and the lessee of immoveable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased:—

"(*i*) The lessee may transfer absolutely or by way of mortgage or sub-lease the whole or any part of his interest in the property and any transferee of such interest or part may again transfer it. The lessee shall not, by reason only of such transfer, cease to be subject to any of the liabilities attaching to the lease. Nothing in this clause shall be deemed to authorise a tenant having an untransferable right of occupancy, the farmer of an estate in respect of which default has been made in paying revenue, or the lessee of an estate under the management of the Court of Wards, to assign his interest as such tenant, farmer, or lessee."

This section does not shew that occupancy-holdings are saleable at the instance of the raiyat or of any creditor of his other than his landlord seeking to obtain satisfaction of his decree for arrears of rent:—Bhiram Ali *v.* Gopi Kanth, I. L. R., 24 Cal., 355; 2 C. W. N., 188.

Jointly and severally liable:—Under section 65 the holding of an occupancy-raiyat is liable to sale in execution of a decree for the rent thereof, which is declared to be a first charge thereon. So when the holding is transferred it continues liable in the hands of the transferee for arrears already accrued due.—Rash Behary Bundopadhya *v.* Peary Mohun Mookerji (1878). I. L. R., 4 Cal., 346; Sham Chand Kundu *v.* Brojo Nath Pal Chowdhury (1873), B. L. R., 484; S. C., 21 W. R., 91. The landlord's remedy is, however, confined to the sale of the holding under his decree. He cannot make the transferee personally liable for rent which accrued due before he became the owner of such holding.—Rash Bihari *v.* Peary Mohan, Supra. The remedies which are provided by the Rent Law for enforcing the payment of rent by sale of the

Remedy in rem.

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tenure or holding or by distress are remedies *in rem*. The personal liability of one tenant cannot be transferred to another. *Ibid.* In a case of a tenure, the liability of the recorded tenant who has transferred his tenure to another person ceases as soon as the transfer has been duly registered under the provisions of the Bengal Tenancy Act, although the landlord may not have received actual notice of such transfer.—Kristo Bulluv *v.* Krista Dutt, I. L. R., 16 Cal., 642; Mohamed Abbus *v.* Brojo Sundari, I. L. R., 8 Cal., 360 (F. B.) Chintamani *v.* Rash Bihari, I. L. R., 19 Cal, 17. In the case of a transfer of his holding by an occupancy-raiyat it is different. The transferee of an occupancy-holding which is transferable by custom cannot maintain a suit for compelling the landlord to register his name in the *semindar's serishta*.—Ambika Prosad *v.* Chowdhry Kashi, I. L. R., 24 Cal., 642. When occupancy rights, transferable by custom, have been transferred, it is open to the transferee to sue under the Specific Relief Act to have it declared that he had acquired certain rights; but if it is the object of such to have it declared that the old tenant is no longer responsible for the rent, such a declaration cannot be obtained without the service of the notice prescribed by this section:—*Ibid.*

Recorded tenant.

In the case of the transfer of the entire holding, the transferor and transferee are liable jointly and severally for arrears accruing due after the transfer. But where only a part of the holding is transferred the recorded raiyat continues solely liable for the entire rent. Neither the sale of the entire holding nor the sale of a part is a ground of forfeiture. —Kabil Sandear *v.* Chander Nath, I. L. R., 20 Cal., 590. Where the landlord not only has knowledge of the transfer but also has received rent from the transferee of a holding which was transferable by custom without the consent of the landlord, he cannot regard the transferor as still in occupation of his holding.—Abdul Aziz *v.* Ahmedali, I. L. R., 14 Cal., 795. Receipt of rent would be equivalent to consent. And this not only in the case of holdings transferable by custom; for, as already observed, even where the holdings are not transferable, receipt of rent would amount to a recognition and sanction of the transfer.

Transfer of part of the holding.

Acceptance of rent.

Apportionment of rent:—See notes under that heading under s. 72 *ante*.

Mode of service of notice:—See Appendix.

Illegal cesses, &c.

74. All impositions upon tenants under the denomination of *abwab*, *mahtut*, or other like appellations, in addition to the actual rent, shall be illegal, and all stipulations and reservations for the payment of such shall be void.

Illegal cesses, &c. Abwab, &c., illegal.

Old Acts:—"The impositions upon the raiyats, under the denomination of abwab,. mahtat and other appellations from their number and uncertainty, having

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become intricate to adjust and a source of oppression to the raiyats—all proprietors of land and dependent talukdars shall revise the same in concert with the raiyats, and consolidate the whole with the *asil* into one specific sum. In large zemindaries or estates, the proprietors are to commence this simplification of the rents of their raiyats in the perganas where the impositions are most numerous, and to proceed in it gradually till completed, but so that it be effected for the whole of their lands by the end of Bengal year 1198 in the Bengal Districts, and of the Fussilee and Willayati year in the Behar and Orissa Districts, these being the periods fixed for the delivery of pottas as hereinafter specified."—(s. 54 Regulation VIII of 1793.) "No actual proprietor of land or dependent talukdar or farmer of land of whatever description shall impose any new abwab or mahtat upon the raiyats under any pretence whatever. Every execution of this nature shall be punished by a penalty equal to three times the amount imposed; and if at any future period it is discovered that a new abwab or mahtat has been imposed, the person imposing the same shall be liable to this penalty for the entire period of such imposition.—(s. 55 *Ib.*)." In the event of any claims being preferred by proprietors of estates or dependant talukdars, farmers or raiyats on engagments wherein the consolidation of asil,, abwab &c.' shall appear not to have been effected, they are to be nonsuited with costs".—(s. 61 *Ib.*). "Such parts of Regulation VIII of 1793 and of Regulation IV of 1794 as require that proprietors of land shall prepare forms of pottas, and that such forms shall be revised by the Collectors, and which declares that engagements for rent contracted in any other mode than that prescribed by the Regulation in question shall be deemed to be invalid, are likewise hereby rescinded and the proprietors of land shall henceforth be considered competent to grant leases to their dependant talukdars, under-farmers and raiyats, and to receive correspondent engagements for the payment of rent from each of these classes or any other classes of tenants according to such form as the contracting parties may deem most convenient and most conducive to their respective interests, provided, however, that nothing herein contained shall be construed to sanction or legalise the imposition of arbitrary or indefinite cesses, however under the denomination of abwab, mahtut or any other denomination. All stipulations or reservations of that nature shall be adjudged by the Courts of Judicature to be null and void; but the Court shall notwithstanding maintain and give effect to the definite clauses of engagements between the parties, or in other words, enforce payment of such sum as may have been specifically agreed upon between them."—(s. 3, Regulation V of 1812). "Every under-tenant or raiyat, from whom any sum is exacted in excess of the rent specified in his pottas, or payable under the provisions of this Act, whether as abwab or under any other pretext, shall be entitled to recover from the person receiving such rent, damages not exceeding double the amount so exacted."— (s. 10 of Act X of 1859 and s. 11 of Act 1869 B. C.)

What are not abwabs:—Section 61 of Reg. VIII of 1793 and s. 3 of Reg. V of 1812 were repealed by s. 1 of Act XVI of 1874; and it should be remembered that this Act repeals ss. 54 and 55 of Reg. VIII of 1793 (schedule 1) without enacting

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any provision about the consolidation of rent,—of the whole with the *asil* into one specific sum. All that this section prohibits is the imposition under the denomination of *abwab mahtut* or other like appellations in addition to the actual rent. Hence in all cases about illegal cesses, the question will now turn about the meaning of the words "actual rent." If a zemindar demands a cess over and above the original rent, which has not the denomination of *abwab*, *mahtut*, or the like, and the raiyat consents and contracts to pay it, this demand and the old rent form a new rent lawfully claimable under the contract, and which together will be the actual rent.—(Jeeatullah *v.* Jugodindra Narain, 22 W. R., 12.) And so if a raiyat, for the purpose of preventing disputes with his landlord, agrees to make a definite payment to the landlord in addition to his rent, the additional payment cannot be treated as an illegal cess; for s. 3, Reg. V of 1812, rather favours such arrangements and provides for their being enforced.—(Serajgunge Jute Company, Limited, *v.* Torabdee Akoond, 25 W. R., 252.) A condition in a lease, that the tenant will pay to the landlord collection charges, can be enforced if the condition is definite and certain in its nature, and forms part of the consideration for the lease.—(Mohomed Fayez Chowdry *v.* Jamoo Gazee, I. L. R., 8 Cal., 730.) Where a lease described a certain sum as collection charges and as forming part of the consideration of the lease, it was held that the sum was part of the rent, and was not an abwab.—(Radha Prosad *v.* Balkvor distinguished. Radha Churn Roy Chaudhuri *v.* Golap Chandra Ghose (1904), 8 C. W. N., 529.) A purabi was held to be a part of the legal consideration for a contract and legally enforcible.—Jugodish *v.* Zarikorlla, 24 W. R., 90; but see Kamalakanta *v.* Kumo Mahomed, 11 W. R., 395. And where a tahsildar had obtained payments from raiyats by way of *bhika* over and above the rent, such sums, if paid voluntarily, were for the benefit of the landlord; and the agent was accountable for the same to the landlord.—Nobin Chunder *v.* Gura Gobind, 25 W. R., 8. Certain payments which were not so much in the nature of cesses as of rent in kind, and which were uniform and had been paid by the raiyat from the beginning according to local custom, were held not to be illegal cesses.—Budhun Orawan Mahton *v.* Baboo Juggessur Doyal Singh, 24 W. R., 4. Khuntagari or the levying by riparian proprietors of a charge imposed upon boatmen for driving pegs into the river bank for the purpose of attaching their boats thereto, is not an illegal cess.—(Dhunput Singh *v.* Denobundhu, 9 C. L. R., 279.) So dák cess is not an abwab, because it is nowhere declared to be illegal, and it is recoverable under a contract under s. 12 of Act VIII of 1862 B. C. Section 3 of that Act provides that "it shall be lawful for the Magistrate of any district or for such officer as the Government may from time to time direct to raise, as hereinafter provided, the monies necessary for the establishment required for the purpose of efficiently maintaining the zemindari dáks within the district, from all zemindars, sadar farmers and other persons paying revenue direct to Government in respect of lands situated within the district;" and

Actual rent.

Purabi.

Khuntagari.

Dak cess.

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s. 5 provides: "The Magistrate or such other officer as aforesaid shall in each and every year, on or before the last day of the month of December, fix, subject to the approval and revision of the Commissioner of the Division, the total sum necessary for the next ensuing year for the efficient service of the zemindari daks in his district, and apportion such amount rateably on the sadar jumma of the parties liable as aforesaid to pay the same, and shall appoint the days for the payment thereof." Section 8 provides: "It shall be lawful for such Magistrate or other officer aforesaid by an order to that effect, to exempt from the liability to payment of an assessment under this Act any person the sadar jumma of whose estates in any one district does not exceed fifty rupees a year." Section 9 provides: "The sums leviable under this Act shall be paid into the district treasury half yearly and in advance by the persons liable to pay the same: and any person or the local agent of any person liable to pay any sum assessed under this Act, who shall refuse or shall for the space of thirty days after the day appointed for the payment thereof neglect to pay the same shall be liable to pay double the amount so assessed, which said double amount in default of immediate payment shall be levied by the order of the Magistrate or of such other officer as aforesaid by distraint and sale of moveable property of the person making the default. Provided always that no person shall become liable to pay double the amount originally assessed, so long as any appeal instituted by him under section 7 of this Act shall be pending. Section 10 provides: "If the whole of the sum raised for the service of any one year be not actually required for that service, the surplus should be placed to the credit of the zemindari dâk account for the next ensuing year, and shall go in reduction of the total sum to be levied for the service of that year under this Act: and when a double amount is levied under the last preceding section, so much thereof as is in excess of the same for which the person from whom it is levied was in the first instance assessed, shall in like manner be placed to the credit of the next ensuing year's account, and go in reduction of the total sum to be levied for that year." And s. 12 provides: "Nothing in this Act contained shall in any way affect or alter any contract or engagement made or to be made by any zeminder with any person holding under him." Under this last section if a raiyat has agreed to pay dâk cess to the zemindar or to his superior landlord, that contract is valid. A suit for dâk cess is ordinarily cognizable by the Court of Small Causes. But where it is claimed under the contract by which the rent is payable, practically as part of the rent, and the occupation of the land is the consideration for its payment, it must be regarded as rent, that is to say, as a part of what is lawfully payable in money for use and occupation of land held by the tenant.—Dheraj Mahtab Chand *v.* Radha Binode, 8 W. R., 517; Erskine *v.* Trilochan 9 W. R., 518. In Watson *v.* Srikrishna Bhumik, (I. L. R., 21 Cal., 132), however, it was held that dâk-cess was to be regarded as rent for purposes of section 135 of the Act. See notes, under sec. 3 (5) *ante* and under section 153 *post*.

Similarly, as regards chaukidars' wages. Where a patnidar was by the terms

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Chaukidars, wages.

of his lease bound to pay half of the pay of the village chaukidars, and the stipulation had been entered into between parties competent to contract and had been made for valuable consideration, it has been held that the amouut the Patnidar had agreed to pay was to be paid quite as much on account of the occupation of the land as that which was expressly called the rent, and was part of the ground-rent quite as much as the latter. It was, therefore, not an abwab, and was recoverable.—Ahsanulla *v.* Tirthabumi, I. L. R., 22 Cal., 680. Similarly other cesses recoverable as rent under any enactment are not cesses but rent.—See s. 3 (5), *ante*. Company's batta in cases of tenure existing from the time when the

Company's batta.

sicca rupee was prevalent or of tenures whose rent has been fixed in sicca rupees is, I presume, not an abwab but a mere exchange and therefore legally recoverable. Act XVII of 1835 first introduced new coins known as Company's rupee, and the relative value between the new coins and the old ones is thus laid down in s. 4: "And be it enacted that the said rupee (Company rupee) shall be received as equivalent to the Bombay, Madras, Furrukabad and Sonat rupees, *and to fifteen-sixteenths of the Calcutta sicca rupee*, and the half and double rupee respectively shall be received as equivalent to the half and double of the above-mentioned Bombay, Madras, Furrukabad and Sonat rupees, *to the half and double of fifteen-sixteehths of the Calcutta sicca rupee*." But the existing contracts for payment of Calcutta sicca rupees at a different rent from the above, if payment was made in any other Presidency, was kept intact by s. 6 which ran thus: "Provided that if in any contract for the payment of Calcutta sicca rupees it shall have been specially stipulated that if payment be made in the territories of Madras, Bombay or Agra Presidency, it shall be made in the rupee now current in those Presidencies respectively, at a different rate from that above provided with reference to the Calcutta sicca rupee, the contract shall be satisfied by payment within those territories of Company's rupees of the amount of Furrukabad., Madras, of Bombay rupees so specially stipulated:—Provided also, that if payment of the principal or interest of the Public Debt be made for the convenience of the creditors at any Public Treasury other than as stipulated in the Notes and engagement of the Government it shall be competent to the Government to make such payments at the same exchange as heretofore." It follows from these provisions that where the contract is in sicca rupees, it is quite legal under Act XVIII of 1835 to recover its value in Company's rupees, or in other words to recover Company's batta or exchange. A sicca rupee exceeds the Company's rupee by 1 anna 5 kowris and 1 kranti. The other Acts relating to the silver coinage are Act XIII of 1836, Act XXVI of 1837 and Act XXI of 1838. Under the first of these, the Calcutta sicca rupee ceased to be a legal tender. The sicca rupee no longer exists as a coin, though it is still used in accounts. It should be remembered that under the present s. 74, the *actual rent* is recoverable, and when the contract is in sicca rupee, is not the Company's rupee *plus* the *batta* or exchange the *actual* rent? Act XIII of 1836 provides that "Sicca rupees shall cease to be a legal tender in discharge of any debt."

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but it does not provide that a contract in Sicca rupees is illegal. If such a contract is made, it is enforceable only in its equivalent value of Company's rupee under the above. Though I have thus given with some diffidence above my views on the subject, I ought to state that in a Sadar-Dewani decision, *batta* or exchange has been held to be an illegal cess.—Chuckun Shahoo *v.* Roop Chand Panday, S. D. A., 1848, 680.

What are abwabs.

The following have been held to be illegal cesses: (1) *nayay* or an exaction from the remaining raiyats to make up the rents of those who had absconded or died—(S. 63, Reg. I of 1793; Dhalee Pramanik *v.* Ananda Chunder, 5 W, R., Act X, 86; (2) *bardana* for the subsistence of the zemindar and kotwalee, a cess for tobacco—Chuckun Shahoo *v.* Roop Chand Panday, S. D. A., 1845, 680; (3) *chanda* or subscription—Meghnath Thakur *v.* Meliss, S. D. A., 1853, 3; (4) *parobi* or festival cess - Kamala Kanta *v.* Kalu Mahomed, 3 B. L. R., H. C., 44; 11 W. R., 395; Mr. Justice Norman observed in this case: "The defendants took a village in ijara from the plaintiff for 10 years. Before the expiration of their lease, the defendants sublet the property, and at the same time entered into an agreement with the plaintiff to the following effect:—"We have been getting your *purabi* (festival cess paid from the villages at rupees 175. The durijaradar has nothing to do with the said *purabi*; we shall pay you the same year after year.' *It was found by both the Lower Courts and is not now denied* that this *purabi* is an arbitrary and indefinite cess on the raiyats such as is described in section 54 of Regulation VIII of 1793. The exaction of such a cess would have been illegal under section 3 of Regulation V of 1812, and is now prohibited by section 10 Act X of 1859. A contract providing for the collection and payment over to the zemindar of the proceeds of such a cess, appears to us to fall within the rule stated by Chief Justice Holt in Bartlet *v.* Viner Cartherd, 252. Every contract made for or about any matter or thing which is prohibited and made unlawful by statute is a void contract.—See Domat's Civil Law, Vices of Covenants, Tit. XVIII section 4. We think the object of the contract was therefore illegal and that the suit was properly dismissed on this ground by the Judge." (5) *purvi bhika* (*percntra* Jagodish Chunder *v.* Tarikulla 24 W. R., 90), a present to the zemindar on his son's first eating rice or *annaprasan*.—Nobin Chander *v.* Gurugovind, 14 W. R., 447;—the Court (Macpherson, O. C., J., and Birch, J.,) observed: "*It seems to us on the evidence* that it (*purabi*) is not in the nature of an abwab or illegal cess but really in the nature of a payment which the parties contracted to make; that there is nothing illegal about it, it being part of the consideration for which the agreement was entered into." This must be held to be overruled by the F. B. decision of chulhan Mahatán. In both these cases, therefore, the question as to whether a *purabi* was an abwab turned upon evidence. (6) *Russum kazza* or *kazie's* fees; although the raiyat had paid it until a judge by proclamation declared it illegal, and although the assessment at the Decennial Settlement was alleged to have included it—Luckhee Debee *v.* Sheik Ahta, S. D. A., 1852, 55.) (7) *patwari's wages or allow-*

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ances—Burma *v.* Sree Nunda, 12 W. R., 29; Mengur Munder *v.* Hari Mohan, 23 W. R., 447); (8) *Zabita batta*, and excess of half an anna in the rupee on the jumma, although, in this instance, the kabuliyat stipulated that the farmer should recover such sums over and above the agreed jumma, as were realised in the mofussil under that head.—Radha Mohan *v.* Gunga Persad, 7 Sel. Rep., 142; (9) a cess, being a certain proportion of every maund of *goor* (molasses) manufactured, over and above the regular money-rent—Sonam Sukul *v.* Sheik Elahi Buksh, 7 W. R., 453; (10) a tax on cattle—Bhagirath *v.* Ram Narain, 9 W. R., 300; (11) *Nussuranas and Mehinanee* have been allowed on the ground that the provisions against the imposition of abwabs were intended to prevent the imposition of new abwabs and not to disallow imposts in force before the Decennial Settlement—Rajah Madho *v.* Rajah Bidyanund, S. D. A., 1848, 442. These should, under the Full Bench decision of Chultan Mahton, be now considered as not recoverable; (12) so a claim for *dasturi batta* and *poonia nussurna* (presents on assessment or payment of the first instalment of rent) have been held valid, when the kabuliyat specified these items, the Court considering that s. 3 of Reg. V of 1872 which authorises the landholders to grant such pottahs as they may think proper, with the proviso that this should not legalise arbitrary or indefinite cesses, legalised customary cesses when specified in the pottahs or kabuliyat, because the Regulation goes on to provide that while all stipulations for such arbitrary or indefinite cesses were to be held null and void, the definite clause of engagements should be carried into effect, and the payment of such sums as were specifically agreed upon enforced.—Bhoor Pasbun *v.* Khem Chand, S. D. A., 1857, 1508. This decision should, I presume, be also supposed to be overruled by the Full Bench refered to.

The whole subject come under consideration in the case of Chultan Mahton *v.* Tiluk Dhari Sing, I. L. R., 11 Cal.. 175, F. B.; the plaint in that case demanded the following customary abwabs:

On the nagdi tenure.

	Rs.	As.	P.	
Rent	75	9	0	
Dasturi	0	7	9	at ½ anna per bigha.
Hujjutana (fee for the hujjut or receipt) ...	0	1	0	
Sonari	2	6	0	at ½ anna per rupee.
Batta Mál	3	11	0	at 3 pice per rupee.
Batta Company	3	13	6	Ditto.
Dák Cess	1	11	0	
Road Cess	12	10	0	
Total ...	100	5	3	

On the bhaoli tenure.

Neg (or the landlord's due) ... ... 1 seer 4 chataks per maund.

Pansera (or the harvest fee) ... ... 5 seers.

Bohwara (for the payment of the wages of the village

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watchman) ... ... 2 chataks per maund.
Powhi (for the payment of the wages of the priest) ... 4 chataks per maund.
Nocha (for the payment of the wages of the village establishments, *viz.*, the patwari 2 chatacks, the gomashta 2 chatacks, the amin 2 chatacks, the pales 1 chatack, the nowinsinda 1 chatack) ... ... 8 chatacks per maund.
Mangun ... ... 30 seers per plough.
Sidha (patwari's due) ... ... 10 seers per plough.

The defendant denied that any arrears of rent were due, but whilst admitting that he was liable to pay 1 anna per raiyat for *hujjutaua*, and 3 pice per rupee for *Batta Company*, contended that other items were illegal cesses and were not recoverable. The Subordinate Judge found that the defendant was liable for road cess and for the items admitted by him, but as regards the remaining items other than the *assul* rent he held that they were illegal, as being contrary to s. 54 of Reg. VIII of 1793. The District Judge found that the evidence given satisfactorily established a custom showing that the cesses claimed on the *nugi* tenure had been prevalent in the village for very many years, and that they had been paid by other raiyats for a long period; and as regarded the dues claimed on the *bhaoli* lands, that the evidence established that these dues had been collected and paid from time immemorial. The High Court found that "*the plaintiff's suit, so far as the disputed abwabs are concerned, should be dismissed.*" Mitter, J. (Tottenham and Pigott JJ., concurring), remarked: "It has been contended before us on behalf of the plaintiffs that the liability relating to the payment of these abwabs flows from the incidents of the contract under which the lands were let to the defendant and his ancestors, such incidents, though not expressly mentioned in the contract, being still deducible from the usage or custom established on the evidence. I am of opinion that this contention, so far as it goes, is sound; but the *question is whether, having regard to the laws in force relating to abwabs, such a contract is enforceable. The solution of this depends upon another question, namely, whether the imposition of such abwabs as these is prohibited and made unlawful by any law in force in this country? If the affirmative be the correct answer of this latter question, it does not admit of any doubt that the plaintiffs are not entitled to enforce the contract and to recover the disputed items, because every contract made for or about any matter or thing which is prohibited and made unlawful by statute, is a void contract.*"—(Section 23, Indian Contract Act). Section 54, Regulation VIII of 1793, says: 'The imposition upon the raiyats under the denomination of abwab, mahtut, and other appellations, from their number and uncertainty having become intricate to adjust and a source of oppression to the raiyats, all proprietors of land and dependent talukdars shall revise the same in concert with the raiyats and consolidate the whole with the assul into one specific sum. The next section provides a penalty for the infraction of the aforesaid provision.' Section 61 of the same Regulation has laid down that, 'in the event of any claims being preferred by proprietors of estates or dependent talukdars, farmers or raiyats on engagements wherein the consolidation of assul, abwab, &c., shall appear

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not to have been made they are to be non-suited with costs. Section 3 of Regulation V of 1812 provides as follows: 'Such part of Regulation VIII of 1793 and of Regulation IV of 1794 as require that the proprietors of land shall prepare forms of pottahs, and that such forms revised by the Collectors and which declare that engagements for rent contracted in any other mode than that prescribed by the Regulations in question shall be deemed to be invalid, are likewise hereby rescinded, and the proprietors of land shall henceforward be considered competent to grant leases to their dependent talukdars, under-farmers, and raiyats, and to receive correspondent engagements for the payment of rent from each of these classes or any other classes of tenants according to such form as the contracting parties may deem most convenient and conducive to their respective interests, provided, however, that nothing herein contained shall be construed to sanction or legalize the imposition of arbitrary or indefinite cesses whether under the denomination of abwab, mahtut, or any other denomination. All stipulations or reservations of that nature shall be adjudged by the Courts of Judicature to be null and void; but the Court shall notwithstanding maintain and give effect to the definite clauses of the engagements between the parties, or, in other words, enforce payment of such sum as may have been specially agreed upon between them.' Section 10 of Act X of 1859, and section 11 of Bengal Act VIII of 1869, declared the exaction of any sum in excess of the rent specified in the pottah of an under-tenant or a raiyat, or payable under the provisions of the aforesaid Acts as abwabs, &c., to be illegal. *Under the provissons of the Regulations and Acts cited above, it seems to me that a contract for the payment of abwabs is unlawful, and is not enforceable by law.* It has been contended before us that a claim for the recovery of the abwabs existing before the Permanent Settlement is enforceable notwithstanding these provisions, because section 54 of Regulation VIII of 1793 contained only a direction the consolidation of the abwabs with the assul jumma, but no penalty was attached to an omission on the part of the landholders to act according to that direction. But it seems to me that this contention is not correct, because section 61 of the said Regulation, in my opinion, provided the penalty in question, that penalty being the non-suiting of the claim for the recovery of the abwabs. Even supposing that this contention is valid, still the plaintiffs cannot succeed in this case. *There being this plain direction in the Regulation, that if it was not complied with, it is for the landlord to prove that these abwabs existed at the time of the Permanent Settlement. The plaintiffs in this case have not established this fact.* It has been *next* contended that, although the disputed items in the plaintiff's claim are described in the plaint, as 'old usual abwabs,' and in the zemindari accounts also they are designated as abwabs, separate and distinct from the specified rent, yet they are not abwabs but part of the rent. This contention is mainly based upon the ground that any thing which is certain and definite does not come under the class of abwabs, the imposition of which is prohibited by the Regulations. *Although the Regulations did not clearly define what an abwab is, still I think that it cannot be maintained that any thing which is definite and certain is not an abwab under the Regulations,* although the parties

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to the contract may call it so. *It seems to me that the Regulations, without defining accurately what an abwab is, left this question for the determination by the Court in each case upon the evidence.* I cannot find anywhere in the Regulation the precise definition of the word abwab which would justify me to treat the disputed items of claim as part of the specified rent, although the plaintiffs claim them in the plaint and entered them in the zemindari accounts as 'abwab.' *It has been further said that, as there is a contract between the parties for the payment of these dues, under the latter portion of section 3, Regulation V of* 1812, *the plaintiffs are entitled to recover them.* But the language of that section does not, in my opinion, support this contention; on the other hand, it provides 'that nothing therein contained shall be construed to sanction or legalize the imposition of arbitrary or indefinite cesses whether under the denomination of abwab, mahtut or any other denomination.' The last four lines of the section in question provide that the engagement for the payment of any sum as may have been specifically agreed upon between parties shall be enforced. *This provision, it seems to me, refers only to the amount which is by the contract fixed as the rent payable to the landlord.* The section in question provides mainly, that the proprietors of the land shall thenceforth be competent to grant leases to ryots, &c., and to receive corresponding engagements *for the payment of rent from them.* Having regard to the words of the section in question italicized, I think the words 'sum specified' refer to the amount of the rent specified. I do not think it necessary to notice in detail the decided cases on this point. There is a clear conflict in these decisions, some of them supporting the view which I take. These in which a contrary view has been taken, have been decided either upon the ground that the abwabs claimed in them, not being indefinite or uncertain, did not come within the class of abwabs. prohibited by the regulations. or, upon the ground that there were clear contracts between the parties for the payment. The last-mentioned ground is evidently based upon the construction of section 3, Regulation V of 1812, for which the learned Counsel for the plaintiffs contended. For the reasons given above, I am unable to adopt this construction. The view which I take of the section in question is supported by the decision of the Sudder Dewanny Adawlut, in Radha Mohun Surma Chowdry *v.* Gunga Pershad Chuckerbuttee. As regards the other ground, *viz.*, that anything which is not uncertain or indefinite, is not an abwab within the meaning of the Regulations, I have already dealt with it." Garth, C. J., said:—"I consider that the Regulation of 1793, as well as the Rent Law of 1859, intended to put an end to the abwab system, and to render them illegal. It has been argued that to abolish this system is contrary to the wishes of both landlords and raiyats, and I believe that to be true. Landlords often find it a convenient means of enhancing their rents in an irregular way, and the raiyats, as a rule, would far rather submit to pay *abwabs* than have their *asal* rent increased. But the system appears to me to be clearly illegal, and I consider that the Civil Courts should do their best to put an end to it."

This decision therefore finds (1) that abwabs are illegal imposts; (2) that a contract for anything unlawful is void and not enforceable: (3) that what are abwabs

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should be determined upon evidence; (4) that in the case under trial the disputed items had been described by the plaintiff as abwabs, and therefore admitted to be so; (5) that the mere fact of a thing being definite and certain does not take it out of the category of abwab; (6) that the last 4 lines of s. 3 of Reg. V of 1812, which speak of giving effect to definite clauses of engagements, refer to the amount which is by the contract fixed as *rent* payable to the landlord and not to abwabs though they may be definite; (7) that abwabs existing at the time of the Permanent Settlement but not consolidated with the *assul* cannot be recovered; and (8) that even if they were recoverable, there was no evidence in the case under trial that the disputed abwabs existed from the time of the Permanent Settlement. Now let us see what is the effect of this decision upon the present section. As we have already said the provision about the consolidation of abwabs with the assul has been repealed. The present section says that the *actual* rent shall be recoverable, but all impositions under the denomination of abwab, mahtut or other like appellations shall be illegal. Hence (1) if an extra amount is stipulated by the tenant and it is not illegal, or denominated as abwab, &c., it shall form his actual rent and would be recoverable; (2) whether the extra amount is abwab or not should be found on evidence; (3) dâk cess and company's *batta* are recoverable under Act VIII of 1882, B. C., and Act XVII of 1835, and are therefore not illegal imposts; (4) if, however, it is found on evidence that the extra amount is abwab or illegal cess, all stipulations about its payment are void; (5) and a payment of an illegal cess for a long number of years does not validate it. This case was appealed to the Privy Council and the judgment of the High Court was affirmed (Tilakdhari Singh *v.* Chultan Mahtan, I. L. R., 17 Cal., 131; L. R., 16 I. A., 152). Their Lordships of the Privy Council said:—"The payments are described in the plaint as old usual *abwabs*; and they are also described as abwabs in the old *samindari* accounts. It appears to their Lordships that the High Court was perfectly right in treating them as *abwabs* and not as part of the rent. Unquestionably they have been paid for a long time; how long does not appear. They are said to have been paid according to long-standing custom. Whether that means that they were payable at the time of the Permanent Settlement or not, is not plain. If they were payable at the time of the Permanent Settlement. they ought to have been consolidated with the rent under s. 54 of Reg. VIII of 1793. Not being so consolidated, they cannot now be recovered under s. 61 of the Regulation. If they were not payable at the time of the Permanent Settlement, they would come under the description of new *abwabs* in s. 55; and they would be in that case illegal." But before the Privy Council decision was passed, in a later case (Padmanadd Singh *v.* Baij Nath Singh, I. L. R., 15 Cal., 828), a Division Bench (Tottenham and Ghose, JJ.,) ruled that "what is and what is not an *abwab* must depend upon the circumstances of each particular case in which the question arises.' It further held that where, by a *kabulyat*, dated 1869, a defendant as holder of a *mukarari* tenure, agreed to pay a certain fixed sum as rent, and also certain sums designated *tehwari* and *salami*, they were not illegal cesses within the Full Bench ruling of Chulhan Mahtan *v.* Tilakdhari Singh, not being uncertain and arbitray in their character, but specific sums which

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the tenants agreed to pay to the landlords, and the payment of which, no less than the payment of rent itself formed part of the consideration upon which the tenancy was created and were in fact, part of the rent agreed to be paid, although not so described; they were, therefore, recoverable under Regulation V of 1812. Accordingly the subject was further considered in the case of Radha Prasad Singh *v.* Bal Kuar Koeri (I. L. R., 17 Cal. F. B., 726), and it was held that certain sums sued for under the head of *sarak*, *neg* and *kharach* were *abwabs*, and were therefore not recoverable, and that all additions to the actual rent are illegal and any agreement to pay them is void. In this case it was pointed out by Petheram, C. J., that the case of Padmanand Singh *v.* Baij Nath Singh, must be regarded as overruled by the Privy Council in Tilakdhari Singh *v.* Chuchan Mahtan. The Full Bench came to the conclusion that "Nothing could be recovered for the occupation of land except one sum which must include everything which was payable for such occupation, arrived at either by agreement or by some judicial determination between the parties; and any contract, whether express or implied, to pay anything beyond that sum, under any name whatever, for or in respect of the occupation of the land, could not be enforced." Accordingly, certain demands for *sarak*, *neg*, and *kharach*, which had been paid for a long time along with the rent and without specification in the rent receipts, were held to be illegal cesses under section 74 of the Act, and not recoverable in law.—*Ibid.* Similarly, a condition to pay a certain amount as the *mamuli* of the landlord's *Thakurbari* in the month of *Bhadro* every year was held to fall within the provisions of section 74 of Act VIII of 1885 and the scope of the Full Bench ruling.—Appeal from special decree 726 of 1899 decided 17th May 1901 (Ameerali and Pratt J. J.)

Resjudicata:—When, in a suit for rent, the rent claimed expressly includes an item which is objected to as an illegal cess, the mere fact that in a previous rent suit between the same parties regarding the same tenure the defendant did not raise this plea, although he could have done so, would not, in the absence of a judicial determination of the point in the previous suit, preclude him from raising it in the subsequent suit.—Woomesh *v.* Buroda, I. L. R., 28 Cal. 17. See also Kailas Mundle *v.* Barada Sundari, I. L. R., 24 Cal., 711.

This section is controlled by section 179:—Section 179 of the Act which provides that nothing in this Act shall be deemed to prevent a proprietor or holder of a permanent tenure in a permanently settled area from granting a permanent *mukarari* lease, on any terms agreed on between him and his tenant is not controlled by section 74.—Ahsanulla Khan *v.* Tirthabashini, I. L. R., 22 Cal. 680. A stipulation for the payment of an *abwab* in a permanent *mukarari* lease is valid; this section does not control section 179.—Krishna Chandra Sen *v.* Sushila Sundari Dasi, I. L. R., 26 Cal., 611; 3 C. W. N., 608.

Non-Judicial account of illegal cesses:—Sir George Campbell in his Administration Report of 1872-74, pp. 23-26, gives the following account of agricultural cesses:—The agricultural cesses are somewhat different in their character. They consist

Sir George Campbell's enumeration of cesses.

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of various dues and charges levied from the ryots in addition to the regular rent and generally in proportion to the rent. The Permanent Settlement Regulations positively prohibited all such duties, strictly confining the zemindars to the customary rent proper; but in this as in other things laws have been wholly set at defiance in modern times. The modern zemindar taxes his ryots for every extravagance or necessity that circumstances may suggest, as his predecessors taxed them in the past. He will tax them for the support of his agents of various kinds and degrees, for the payment of his income-tax and his postal cess, for the purchase of an elephant for his own use, for the cost of his stationery of his establishment, for the cost of printing the forms of his rent receipts, for the payment of his lawyers. The milkman gives his milk, the oilman his oil, the weaver his clothes, the confectioner his sweetmeats, the fisherman his fish. The zemindar levies his benevolences from his ryots for a religious ceremony, for a birth, for a marriage; he exacts fees from them on all change of their holdings, on the exchange of leases and agreements, and on all transfer and sales; he imposes a fine on them when he settles their petty disputes, and when Police or the Magistrate visit his estates; he levies blackmail on them when social scandals transpire, or when an offence or an affray is committed. He establishes his private pound near his cutcherry and realizes a fine for every head of cattle that is caught trespassing on the ryots' crops. The abwabs, as these illegal cesses are called, pervade the whole zemindari system. In every zemindari there is a naib; under the naib there are gomastahs; under the gomastahs there are piyadas or peons. The naib exacts a *hisabana* or perquisite for adjusting accounts annually. The naibs and gomastahs take their share in the regular abwabs; they have their little abwabs of their own. The naib occasionally indulges in an ominous raid in the mofussil; one rupee is exacted from every raiyat who has a rental as he comes to proffer his respects. Collecting peons, when they are sent to summon raiyats to the landlord's cutcherry, exact from them daily four or five annas as summon fees..

Perhaps the best proof of the extent and nature of the illegal cesses will be found in the Presidency Division, the most widely educated and most under the eye of Government of the divisions in Bengal. The subjoined list of 27 different sorts of illegal cesses has been officially reported from the 24-Pergunahs district alone:—

(1.) Dâk khurcha.—The cess is levied to reimburse the zemindar for amounts paid on account of zemindari dâk tax. The rate at which it is levied does not exceed three pice per rupee on the amount of the tenant's rent.

(2.) Chânda.—Including bhikya or mangon. A contribution made to the zemindar when he is involved in debt requiring speedy clearance.

(3.) Parbony.—It is paid on occasion of poojah and other religious ceremonies in the zemindar's house. The rates of its levy is not more than four pice per rupee.

(4.) Tohurria.—A fee paid on the occasion of audit of raiyats' accounts at the end of the years.

(5.) Forced labour or bazar.—This labour is exacted from the raiyats without payment.

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(6.) Maroocha or marriage-fee.—Paid on the occasion of a marriage taking place among the raiyats. It is fixed at the discretion of the zemindar.

(7.) Ban Salami.—A fee levied on account of preparation of goor or molasses from sugarcane.

(8.) Salami.—Including all fees paid on the change of raiyats' holdings and on the exchange of pottahs and kabuliyats.

(9.) Kharij dakhil.—A fee commonly at the rate of ₹5 per cent., levied on the mutation of every name in the zemindar's books.

(10.) Taking of rice, fish, and other articles of food on occasions of feasts in the zemindar's house.

(11.) Batta and multa kumrae.—The former is charged for conversion from sicca to Company's rupee; the latter on account of wear and tear of the same.

(12.) Fines.—These are imposed when the zemindar settles petty disputes among his raiyats.

(13.) Police khurcha.—A contribution levied for payment to police officers visiting the estate for investigating some crime or unnatural death.

(14.) Junimajatra and rash khurcha are exceptional imposts, levied on occasions of certain festivals.

(15.) Bardaree khurcha.—A contribution levied at heavy rates by a farmer taking a lease of a mehal.

(16.) Tax or income-tax levied by a few zemindars to reimburse for what they pay to Government on account of this tax.

(17.) Doctor's fees.—This is levied exceptionally by a few zemindars on the plea that they are made to pay a similar fee to Government.

(18.) Tant kur.—A tax of 4 annas levied from every weaver for each loom.

(19.) Dhaie mehal.—A fee levied from every wet-nurse carrying on her profession in the zemindar's estate.

(20.) Anchora salami.—A fee paid by persons carrying on illicit manufacture of salt.

(21). Halbhanqun.—A fee paid by a raiyat on his plough-land for the first time in each and every year.

(22.) Mathooree jumma.—A tax levied on barbers.

(23.) Shashun jumma.—A tax levied on Moochees for the privilege of taking hides from the carcasses of beasts thrown away in the bhangor of a village.

(24.) Punnah khurcha.—A contribution made by the raiyats on the day the punniah ceremony takes place.

(25.) Bastoo poojah khurcha.—A contribution made for the worship of bastoo pooroosh (god of dwelling houses) on the last day of the month of Pous.

(26.) Rashud khurcha.—A contribution levied to supply with provision some district authority or his followers making a tour in the interior of the estate.

(27.) Nazarana or presents made to the zemindar on his making a tour through his estate.

In most districts the cesses are peculiar to the district. In all district it must be said

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that these exactions largely prevail. It has been found that they are really almost quite universal, the only difference being that in some places and in some estates they are levied in greater numbers and amount, and in less numbers and amount in others.

The following is a translation of a list of abwabs actually exacted from the ten or fifteen house-holders of a small hamlet in Nuddea, men neither of substance nor yet of exceptional poverty. The zemindari gomastahs proceeded with their peons to this village during the inundation of 1871, and apportioning on an average their requirements at 3 annas to every rupee of rental, demanded a benevolence of fifty-four rupees and two annas. The translation is made from a list prepared under their own hand and admitted by them in Court.

	Rs.	A.	P.
Nuzzur to the naib at the punyah or the annual settlement of rent, when the first payment for the coming year is made	6	0	0
Nuzzur to the mahashoys or the zemindars (of whom there are five shares) on the same occasion	5	0	0
Nuzzur to gomastahs at the punyah	2	0	0
Tulubana or summons fees of peons at the punyah	1	0	0
Cost of conveying bamboos of Gopalnuggur	1	0	0
Tuluba of peon for the instalment of rent due in the month of Asharh ...	0	13	0
Tulubana of peon for the instalment of rent due in the month of Bhadro	1	5	0
Boat-hire	1	8	0
Parboni (a donation granted at the time of the poojah) to the amla of the sudder cutchery	6	8	0
To jamadar of the cutchery	1	0	0
To halshana (a sort of under-bailiff)	1	0	0
Parboni to the five zemindars	5	0	0
To Sai Ram Sen, head mohurrir	1	0	0
Alms to the purohit (a family priest) of the zemindars	2	0	0
Alms to gomastahs	12	0	0
Alms to the mohurrir	3	0	0
To the zemindari burkundazes for the Holi festival	1	0	0
On account of zemindari dâk tax	3	0	6
Total ...	54	2	0

This case has been given at length to illustrate the usual nature of these exactions * * *. This case was especially reported by the Board of Revenue to Government,

Dr. Hunter's enumeration of cesses.

Dr. Hunter gives the following abwabs in his *Statistical Account of Bengal, Gya*, pp. 70-72. These are more or less in vogue in all the Behar Districts. "Besides the above-mentioned payment, there are a number of customary cesses sanctioned by immemorial antiquity, paid at harvest time by the cultivator to the landlord or his servants. The ordinary tenure of land which will be described at length on a subsequent page, is

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analogous to metayer system, half the real or estimated out-turn of the crop at each harvest going to the landholder and half to the cultivator. But before the cultivator can take his half share of the produce, numerous demands have to be satisfied. These will vary in number and amount with the temper of the landowner, and the extent of the cultivator's power of endurance; but the following fees are generally demanded and paid without much reluctance:—(1) *Dáhiak* (literally 10 per cent.) is taken by the landlord, compensation for dryage and wastage. (2) *Manseri*, an extra seer in each maund—that is 2½ per cent. is often taken by the landlord in lieu of dáhiak; but sometimes both are demanded. (3) *Sidhà* (literally "daily food"). According to Mr. Bourdillon, this is taken at the time of sowing by the landlord's agents at the rate of 2½ lbs. of rice with condiments to match from each cultivator. Mr. Beames puts it to 10 lbs. from each house; but the amount of these taxes constantly varies, and the rates which prevail in one year are changed in the next. (4) *Manzan* is taken by the same agent at harvest. Mr. Bourdillon puts the amount at 6 seers for every 15 maunds, that is, about 15 per cent. from each cultivator; while Mr. Beames rates it higher, 80 lbs. for each plough owned by a cultivator. (5) *Nocha* or "plucking" is taken by the barahil at the rate of 2 chataks per maund, or about ½ per cent. (6) *Fihia*, corruption of *fihal* "each plough," is a fee taken to cover the expense of the landlord's visitors. (7) *Salami* is a fee often demanded by the landlord on granting a new lease, or renewing an old one. (8) *Hujatana*, literally "that which is disputed," is a fee given to the village accountant upon signing the quittance for rent. (9) *Dandidari* or *asitis*, called in the sub-division of Nawada, *sonari*, "is the commission paid to the weigher of the produce who himself, according to Mr. Beames, pays half of what he receives to the landlord. According to Dr. Buchaman Hamilton, the hereditary mendicants are usually supported by receiving a portion of the weigher's commission. (10) *Vishnu Parit* and *agaun* are names given to the percentage of crops which is made over to Brahmans. The former is taken entirely from the cultivator's share, while the landowner helps to pay the latter tax.

"The preceding cesses are paid by the cultivators only; but other classes are not exempted from the following:—(1) There are certain fees still claimed by the landlord to cover the expense of converting native money into the coin of the realm; such as *batta kalahdar* for the conversion of copper money into sicca rupees, and *batta naiyab*, for the conversion into the rupees now in use. (2) *Bardáná* is paid by the owners of pack-bullocks, at the rate of 3*d*. for each bullock. (3) *Mutharfa* or house-rent is levied from all tradesmen at the rate of 9*d*. a year. (4) *Tolai* is taken from all petty traders resorting to fairs at the daily rate of one chatak of oil, salt or tobacco. (5) *jalkar* is a percentage on all fish caught in the village reservoirs or artificial channels. (6) *Bankar*, a similar percentage on jungle produce. (7) *Rasúm gilandazi* is taken from the wages of the workmen who are employed in constructing an embankment on the estate. (8) *Rasumtari* is taken from the keeper of every liquor shop who sometimes has to pay a sum equal to the Government demand. (9) *Kahharai* is a fee for leave to pasture cattle on an estate.

"All these various demands are not invariably levied. In times of scarcity

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most are remitted; but in years of plenty even more will be extorted on various pleas, such as to pay the expense incurred by the landlord in marrying one of his relations, or to cover the amount of a new tax levied by Government. In fact the cultivator is deprived by his landlord of all but the barest necessaries; and he is so ignorant that he never thinks of applying for redress."

It will be observed that some of the above enumerated by Sir George Campbell and Dr. Hunter are not illegal cesses judicially considered.

Penalty for exaction by landlord from tenant of sum in excess of the rent payable.

75. Every tenant from whom, except under any special enactment for the time being in force, any sum of money or any portion of the produce of his land is exacted by his landlord in excess of the rent lawfully payable, may, within six months from the date of the exaction, institute a suit to recover from the landlord, in addition to the amount or value of what is so exacted, such sum by way of penalty as the Court thinks fit, not exceeding two hundred rupees; or when double the amount or value of what is so exacted exceeds two hundred rupees, not exceeding double that amount or value.

Old Act:—section 11 of Act VII of 1869 (B. C.) and s. 10 of Act X of 1859.

Except under any special enactment for the time being in force:—See Act IX of 1880 B. C., s. 47; Act II B. C. of 1882, s 74; Act V B. C. of 1875, s. 38, III of 1876 B. C. s. 85, VI B. C. of 1880, s. 44.

Exacted:—Where a zemindar after granting a ticca lease, collects the rents direct from the raiyats, and the amount so received exceeds the rent due from the ticcadar, the excess amount so collected is an exaction and is recoverable under this section.—(Ram Pershad *v.* Ramtahal, Marsh., 655.) In other words, any sum which is collected by a landlord in excess of the amount due to him under the agreement with his raiyat is an exaction, for the recovery of which a suit will lie under this section. It is not, however, an exaction when the excess is recovered by legal process, where, for instance, a tenant supplied the zemindar with rice, on the agreement that the value of the rice was to be deducted from the rent, and the zemindar without making the deduction, sued the tenant under Reg. VIII of 1819, and recovered the full amount of the rent, it was held that this was not an exaction under this section. "The tenant," observed the Court, "might have contracted his liability to pay the amount, and might have demanded a summary investigation as to the amount due, and he might have stayed the sale of the tenure by depositing the amount claimed. Instead of doing so, he paid the amount claimed to the zemindar. The zemindar having recovered the amount under a proceeding prescribed by law, the question is whether that is an undue exaction? He possibly might have demanded more than was due after allowing for the rice supplied, but the defendant instead of demanding an

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investigation, paid the amount claimed with knowledge of all the facts. Can this be said to be an illegal exaction of rent within section 10, Act X of 1859? We think that it is not an illegal exaction of rent within the meaning of that Act."—(Chundermoni *v.* Debendra Nath, Marsh., 420) And where, on the allegation that the defendant had sublet land to him for the purpose of raising crops under a contract to share the produce between them, plaintiff sought to recover the value of his share of the crop which the defendant had misappropriated, it was held that the claim was for a sum exacted in excess of the rent.—(Gurrebollah *v.* Fakeer Mahomed, 10 W. R., 203). But a suit for the recovery of money alleged to have been paid by the plaintiff to an ijaradar on account of arrears of rent, when the same has not been applied to the purpose for which it was given, is cognizable under this section.—(Brojo Nath *v.* Shumbhoo Chunder, 18 W. R., 25). Sums exacted by a tahsildar from tenants cannot be recovered by the landlord in a civil suit.—(Nobin Chander Rai *v.* Guru Govind Mazumdar, 25 W. R., 8).

No second appeal:—A suit under this section for a sum of money claimed as an excess payment of rent exacted from a tenant is one cognizable by a Court of Small Causes, and no second appeal will lie in such a suit.—(Ranga Rai *v.* Holloway 4 C. W. N., 95).

Limitation:—A suit to recover a sum of money alleged to have been paid by the plaintiffs to the defendants in excess of the sum demandable by the latter from the former on account of road-cess and public works cess is governed by Art. 96 of the second schedule of the Limitation Act.—Mathura Nath *v.* Steel, I. L. R., 12 Cal., 533.

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CHAPTER IX.

MISCELLANEOUS PROVISIONS AS TO LANDLORDS AND TENANTS.

Improvements.

Definition of "improvements."

76. (1) For the purposes of this Act, the term "improvement," used with reference to a raiyat's holding, shall mean any work which adds to the value of the holding, which is suitable to the holding and consistent with the purpose for which it was let, and which, if not executed on the holding, is either executed directly for its benefit, or is, after execution, made directly beneficial to it.

(2) Until the contrary is shown, the following shall be presumed to be improvements within the meaning of this section :—

(*a*) the construction of wells, tanks, water channels and other works for the storage, supply or distribution of water for the purposes of agriculture, or for the use of men and cattle employed in agriculture ;

(*b*) the preparation of land for irrigation ;

(*c*) the drainage, reclamation from rivers or other waters, or protection from floods, or from erosion or other damage by water, of land used for agricultural purposes, or waste-land which is culturable ;

(*d*) the reclamation, clearance, enclosure or permanent improvement of land for agricultural purposes ;

(*e*) the renewal or re-construction of any of the foregoing works, or alterations therein or additions thereto ; and

(*f*) the erection of a suitable dwelling-house for the raiyat and his family, together with all necessary out-offices.

(3) But no work executed by the raiyat of a holding shall be deemed to be an improvement for the purposes of this Act if it substantially diminishes the value of his landlord's property.

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Sections 76 to 83 are new. They are modelled on the North-Western Provinces Rent Act, XII of 1881, and the Land Improvement Loans Act XIX of 1883, are borrowed from the English Statute, 46 & 47 Vict. cap. 61, entitled the Agricultural Holdings (England) Act, 1883, which was passed on the 25th August 1833 and came into operation on the 1st January, 1884.

Compare this section with ss. 30, clause (c), and 33, cl. (a) *ante* and ss. 80 and 81 *post*.

Nothing in any contract between a landlord and tenant made before or after the passing of the Act can take away or limit the right of a tenant, as provided by the Act, to make improvements and claim compensation for them.—Section 178 (1), clause (*d*), *post*.

Sub-section (1)—Consistent with the purpose for which it was let:—Not only should the work add to the value of the holding, but it must be consistent with the purpose for which it was let. "The principle of giving protection to the landlord against improper usage of the land by the tenant was generally recognized in Europe." (*His Excellency the Viceroy, Debate on the Bill.*) "The raiyat ought not to divert the land from the purposes for which it was let." (*Sir Steuart Bayley, Debate on the Bill.*) In Anund Kumar Mookerjee *v.* Bissonath Banerjee, 17 W. R., 416, it was held that no tenant taking land is entitled to change the nature of that land from what it was when he got it, or make a permanent alteration in the landlord's property. In Tarini Churn Bose *v.* Ramjee Pal, 23 W. R., 298, the Judges held that continual use of the land for twenty-five years for making bricks, raises a strong presumption of acquiescence on the part of the landlord; where a tenant has been guilty of a breach of duty in the use of his land, such as making a tank in it, building on it improperly, or changing the character of the cultivation, such conduct does not necessarily operate as a forfeiture so as to render the tenant liable to ejectment. "The statutory right of occupancy cannot be extended so as to make it include complete dominion over land subject only to the payment of rent liable to enhancement. The landlord is still entitled to insist that the land shall be used for the purposes for which it was granted, and, although a liberal construction may be adopted, it cannot extend to a complete change in the mode of enjoyment.—Baboo Lall Sahoo *v.* Deonarain Singh, I. L. R., 3 Cal., 781; 2 C. L. R., 295. In Kadumbini *v.* Nobin Chunder, 2 W. R., 15, it was held that making holes in land for providing earth for bricks or allowing others to do so would be doing permanent damage to the landlord's property. The tenant of an agricultural holding planted his jote with mango trees without the consent of his landlord, thus changing the character of the land. More than three years afterwards the landlord sued for a mandatory injunction to have the mango trees removed, it was held that, having stood by and allowed the tenant to spend his labor and capital in the land without taking any action in the matter, the landlord was not entitled to a mandatory injunction.—Myna Misser *v.* Rafikun, I. L. R., 9 Cal., 609.

Directly for its benefit.—The following explanation is given in the Central Provinces Tenancy Act (s. 3, cl., 8): "Explanation 2:—A work which benefits

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several holdings may be deemed to be, with respect to each of them, an improvement."

Sub-section (2).—Clauses (*a*) to (*e*) are the same as in the Land Improvement Loans Act XIX B.C. of 1883. Clauses (*b*) and (*f*) have no place in the North-Western Provinces Rent Act XII of 1881 or the Oudh Rent Act XIX of 1868. Clause (*b*) has been enacted with an eye to the Bengal Irrigation Act, and the reason of cl. (*f*) is apparent.

Construction of wells and tanks.—This supersedes Monindra Chunder *v.* Muneeraddin, 8 B. L. R., App. 40.

Water Channels.—The Bengal Embankment Act defines a Water-course to "include a line of drainage, weir, culvert, pipe, or other channel for the passage of water, whether natural or artificial."

Drainage.—Drainage work under the Irrigation Act "means any work in connection with a system of irrigation which has been or may hereafter be made or improved by the Government for the purposes of the drainage of the country, whether under the provisions of Part IV of this Act or otherwise, and includes escape-channels from a canal, dams, weirs, embankments, sluices, groynes and other works connected therewith, but does not include works for the removal of sewage from towns."

Protection from flood.—These are embankments and flood embankments under the Irrigation Act. Flood-embankment "means any embankment constructed or maintained by the officers of Government in connection with any system of irrigation-works for the protection of lands from inundation, or which may be declared by the Lieutenant-Governor to be maintained in connection with any such system; and includes all groynes, spurs, dams, and other protective works connected with such embankments." And an embankment under the Embankment Act "includes every bank, dam, wall and dyke, made or used for excluding water from or for retaining water upon, any land, and every sluice, spur, groyne, training wall or other work annexed to a portion of any such embankment, and every bank, dam, dyke, wall, groyne, or spur, made or erected for the protection of any such embankment or of any land from erosion or overflow by or of rivers, tides waves or waters; and also all buildings intended for purposes of inspection and supervision."

Clearance.—Will not include the cutting down of valuable trees. Compare s. 23 of the Act; nor the converting of an orchard or garden into an arable land. See Gopeekissen Gossain *v.* Doulat Mir, 1 W. R., 156, where the lease reserved the right in all timber, then growing or hereafter to grow, to the landlord, and the tenant sold the trees. In Ruttunjee Eduljee *v.* Collector of Tana 10 W. R., P. C., 13, the Privy Council observed: "The trees on the land, and the right to cut down and sell those rights was incident to the proprietorship of the land."

Erection of a suitable dwelling house.—As to the raiyats' power of erecting a suitable house for himself and his family, see notes under s. 20, p. This provision supersedes Jugut Chunder *v* Eshan Chunder, 24 W. R., 220, which held that a lesee cannot build on land held by him for cultivation. In Niamutulla *v.*

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Govind Churan, 6 W. R., Act X, 40, it was held that every raiyat with a right to hold his land permanently such as an occupancy-raiyat, could build a pukka house on the land or do with it what he liked, so long as he did not injure it to the detriment of his landlord. A suitable house can be built by an occupancy raiyat not being a tenant at will.—Beni Madhab Banerjee *v.* Jai Krishna Mukherjee, 7 B. L. R., 152; 12 W. R., 495. Distinguished in Hari Kisore *v.* Kisore Acharjya, 8 C. W. N., 754. The right of a non-occupancy raiyat in his holding is not heritable; and therefore when he dies, the benefit of, and the money sunk in, the improvements made by him under this section are lost to his heirs, who would seem to be liable to ejectment from the land and dwelling-house at the pleasure of the landlord:—Karim *v.* Sundar, 1 C. W. N., 89: I. L. R., 24 Cal. 207.

Right to make improvements in case of holding at fixed rates and occupancy-holding.

77. (1) Where a raiyat holds at fixed rates or has an occupancy-right in his holding, neither the raiyat nor his landlord shall, as such, be entitled to prevent the other from making an improvement in respect of the holding, except on the ground that he is willing to make it himself.

(2) If both the raiyat and his landlord wish to make the same improvement, the raiyat shall have the prior right to make it, unless it affects another holding or other holdings under the same landlord.

See notes under s. 76.

Collector to decide question as to right to make improvement, &c.

78. If a question arises between the raiyat and his landlord—

(*a*) as to the right to make an improvement, or

(*b*) as to whether a particular work is an improvement,

the Collector may, on the application of either party, decide the question and his decision shall be final.

Right to make improvements in case of non-occupancy-holding.

79. (1) A non-occupancy-raiyat shall be entitled to construct maintain and repair a well for the irrigation of his holding, with all works incidental thereto, and to erect a suitable dwelling-house for himself and his family, with all necessary out-offices; but shall not, except as aforesaid and as next hereinafter provided, be entitled to make any other improvement in respect of his holding without his landlord's permission.

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(2) A non-occupancy-raiyat who would, but for the want of his landlord's permission, be entitled to make an improvement in respect of his holding, may, if he desires that the improvement be made, deliver, or cause to be delivered, to his landlord a request in writing calling upon him to make the improvement within a reasonable time; and if the landlord is unable or neglects to comply with that request, may make the improvement himself.

"We have in section 79 provided that a non-occupancy-raiyat shall be entitled to construct a well for the irrigation of his holding. A well constructed under this provision will be an improvement within the meaning of the Act, and the raiyat will, on being ejected, be entitled to receive compensation for it. The high importance of facilitating and encouraging the construction of all works of irrigation in this country, with a view to the prevention of famine, points to the necessity of this." *(S. C. B. III.)*

Registration of landlord's improvements.

80. (1) A landlord may, by application to such Revenue-officer as the Local Government may appoint, register any improvement which he has lawfully made or which has been lawfully made at his expense or which he has assisted a tenant in making.

(2) The application shall be in such form, shall contain such information, and shall be verified in such manner, by local inquiry or otherwise, as the Local Government from time to time by rule directs.

(3) The officer receiving the application may reject it if it has not been made within twelve months—

(*a*) in the case of improvements made before the commencement of this Act—from the commencement of this Act;

(*b*) in the case of improvements made after the commencement of this Act—from the date of the completion of the work.

This section should be read with ss. 33 (1) (*a*) and 30 (*e*).

Government rules.—See rules 1 to 6, Chapter III of the Government rules, Appendix .

Application to record evidence as to improvement.

81. (1) If any landlord or tenant of a holding desires that evidence relating to any improvement made in respect thereof be recorded, he may apply to a Revenue-officer, who shall thereupon, at a time and place of which notice shall be given to the parties, record the evidence, unless he

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considers that there are no reasonable grounds for making the application, or it is made to appear that the subject-matter thereof is under inquiry in a Civil Court.

(2) When any matter has been recorded under this section, the record thereof shall be admissible in evidence in any subsequent proceedings between the landlord and tenant or any persons claiming under them.

See rule 7, Chapter III of the Government rules, Appendix.

Compensation for raiyat's improvement.

82. (1) Every raiyat who is ejected from his holding shall be entitled to compensation for improvements which have been made in respect thereof in accordance with this Act by him, or by his predecessor in interest, and for which compensation has not already been paid.

(2) Whenever a Court makes a decree or order for the ejectment of a raiyat, it shall determine the amount of compensation (if any) due under this section to the raiyat for improvements, and shall make the decree or order of ejectment conditional on the payment of that amount to the raiyat.

(3) No compensation under this section for an improvement shall be claimable where the raiyat has made the improvement in pursuance of a contract or under a lease binding him, in consideration of some substantial advantage to be obtained by him, to make the improvement without compensation, and he has obtained that advantage.

(4) Improvements made by a raiyat between the 2nd day of March 1883, and the commencement of this Act, shall be deemed to have been made in accordance with this Act.

(5) The Local Government may, from time to time, by notification in the official Gazette, make rules requiring the Court to associate with itself, for the purpose of estimating the compensation to be awarded under this section for an improvement, such number of assessors as the Local Government thinks fit, and determining the qualifications of those assessors and the mode of selecting them.

As to ejectment, see ss. 18, cl. (6) and ss. 25, 44, 45, 46 & 49 *ante* and ss. 155 and 156 *post*.

Section 178, sub-s. (1), cl. (*d*), provides that nothing in any contract between

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a landlord and a tenant made *before or after* the passing of this Act, shall take away the right of a tenant as provided by this Act to claim compensation for improvements.

The 2nd day of March 1883 is the day on which leave was obtained to introduce the Bengal Tenancy Bill into the Council.

Non-occupancy raiyat's right to compensation :—In spite of certain *dicta* to the contrary, the right of a non-occupancy raiyat to claim compensation for improvements, being a personal right, descends, upon his death, to his heirs, although the right to the holding itself may not be heritable, and although, as has been held, the heirs may not be entitled to maintain an action for recovering possession of the holding, after re-entry by the landlord, upon the demise of the raiyat.—Karim Choukidar *v.* Sundar Bewa, I. L. R., 24 Cal., 207.

No rules have been framed under the provisions of sub-section (5) of this section.

Principle on which compensation is to be estimated.

83. (1) In estimating the compensation to be awarded under the last foregoing section for an improvement, regard shall be had—

(*a*) to the amount by which the value, or the produce, of the holding or the value of that produce, is increased by the improvement;

(*b*) to the condition of the improvement, and the probable duration of its effects;

(*c*) to the labour and capital required for the making of such an improvement;

(*d*) to any reduction or remission of rent or any other advantage given by the landlord to the raiyat in consideration of the improvement; and

(*e*) in the case of a reclamation or of the conversion of unirrigated into irrigated land, to the length of time during which the raiyat has had the benefit of the improvement at an unenhanced rent.

(2) When the amount of the compensation has been assessed, the Court may, if the landlord and raiyat agree, direct that, instead of being paid wholly in money, it shall be made wholly or partly in some other way.

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Acquisition of land for building and other purposes.

Acquisition of land for building and other purposes.

84. A Civil Court may, on the application of the landlord of a holding, and on being satisfied that he is desirous of acquiring the holding or part thereof for some reasonable and sufficient purpose having relation to the good of the holding or of the estate in which it is comprised, including the use of the ground as building ground, or for any religious, educational or charitable purpose,

and on being satisfied on the certificate of the Collector that the purpose is reasonable and sufficient,

authorise the acquisition thereof by landlord upon such conditions as the Court may think fit, and require the tenant to sell his interest in the whole or such part of the holding to the landlord upon such terms as may be approved by the Court, including full compensation to the tenant.

This section was declared in force in the Sonthal Parganas by Government Notification, dated 20th February 1897.—See Appendix.

On the application of the landlord:—A person who is not the immediate landlord of a holding can not make an application for acquisition of land under this section.—Narain Mahta *v.* Tekait Brojo Behari 9 C. W. N., 472.

Procedure upon application for acquisition:—There must first be an application; upon that application the Court has to go through a certain judicial process. It must be satisfied (1) that the landlord is desirous of acquiring the holding or part thereof; (2) that the purpose for which he is so desirous is reasonable and sufficient; (3) that the purpose aforesaid has relation to the good of the holding or of the estate, and (4) that the Collector is also of the same opinion that the purpose is reasonable and sufficient. When it has found these facts it may proceed to authorise the acquisition of the lands upon such conditions as it may think fit. Even then it is discretionary with the Court to make the order for compulsory acquisition or not. The words "on being satisfied on the certificate of the Collector," &c., cannot possibly be supposed to cut down all that had gone before. The words "on being satisfied" are repeated in the third clause from the collocation of the preceding words and the necessity for making it clear that the Court must also have before it the opinion of the Collector that the purpose is reasonable and sufficient and the certificate is to be the evidence of that opinion. The Collector's certificate is thus a *sine qua non* to obtaining an order from the Civil Court. The landlord may apply before obtaining a certificate, but no order can be made under section

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84 unless the Court is satisfied that the Collector is of opinion also that the purpose is reasonable and sufficient. The section, thus construed, does not do violence to the language, and keeps in view the policy of the Tenancy Act. To make the Collector's certificate conclusive would, as has been already pointed out by Mr. Justice Prinsep, be not only contrary to the policy of the Act, but disastrous to the tenants. Remembering what the effect of these compulsory acquisitions would be, that they would withdraw *raiyati* lands from that category and make them the *khas* lands of the *samindar*, and remembering how carefully the Legislature has endeavoured to prevent the destruction of *raiyats'* holdings, under whatever disguise attempted, we can well understand the anxiety of the Legislature to provide a double safeguard against such compulsory alienations of *raiyati* lands. It has provided a judicial inquiry as to the sufficiency and reasonableness of the purpose, guarded by the opinion of the executive head of the district to the same effect. That this opinion is not hypothetical is borne out by the words of the Final Report of the Select Committee: "We have inserted a new section (84) giving power to landlords to acquire by compulsory sale, through the Civil Court and at a price to be fixed by the Court, any land in thier estate required for building purposes or for religious, charitable or educational objects. The necessity of some such power, especially with a view to provide building sites either for new tenants or in cases of diluvion, has been strongly urged upon us. *We have guarded the section against abuse by requiring the certificate of a Collector as to the sufficiency of the reason before action can be taken under it.*—Goghan Molla *v.* Rameshur Mahata, I. L. R., 18 Cal. 271, 288, 289.

Collector's Certificate:—*Held* by Prinsep and Ameer Ali, JJ. (Petheram, C. J., dissenting).—That the Collector's certificate under s. 84 is not conclusive as to the reasonableness and sufficiency of the purpose for which the land is sought to be acquired. That the jurisdiction of the Civil Court is not confined to giving effect to the Collector's certificate, but the Court is to hold a judicial enquiry to determine the reasonableness and sufficiency of the purpose and all matters coming within the section, and is competent to consider the grounds upon which the certificate was granted. That the appointment of a European manager and the necessity for erecting buildings for his comfort and convenience are insufficient grounds for authorising the compulsory acquisition of land under s. 84. The purpose for which the land is sought to be acquired must have a direct relation to the good of the holding, and objects which might have a remote or speculative bearing upon the good of the holding are foreign to the scope of the Act.—*Ibid.*

Reasonableness and sufficiency of purpose.

Where the lower Court ordered the acquisition of land under this section on the ground that by the acquisition the revenue would be increased and consequently it would be for the improvement of the estate: *held* that the purpose was not reasonable and sufficient within the meaning of this section. The Collector's certificate as to whether the purpose is reasonable is not conclusive; the Civil Court

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should hold an enquiry as to the reasonableness and sufficiency.—Narain Mahto *v.* Tekait Brojo Behari Singh, 9 C. W. N., 472.

Appeal :—An order made by a Civil Court under s. 84 of the Bengal Tenancy Act is not appealable, not being a decree within the meaning of s. 2 of the Code of Civil procedure, and no appeal being allowed by s. 588 of the Code, or by any special provisions of the Bengal Tenancy Act ; Goghun Mollah *v.* Rameshur Narain Mahta, I. L. R., 18 Cal., 274; referred to and followed.—Peari Mohun Mukerji *v.* Barada Churn Chukrabutti, I. L. R., 19 Cal., 485.

Sub-letting.

85. (1) If a raiyat sub-lets otherwise than by a registered instrument, the sub-lease shall not be valid against his landlord unless made with the landlord's consent.

*Sub-letting.
Restrictions on sub-letting.

(2) A sub-lease by a raiyat shall not be admitted to registration if it purports to create a term exceeding nine years.

(3) When a raiyat has, without the consent of his landlord, granted a sub-lease by an instrument registered before the commencement of this Act, the sub-lease shall not be valid for more than nine years from the commencement of this Act.

"We have inserted a section (85) providing that if a raiyat sub-lets otherwise than by a registered instrument, the sub-lease shall not be valid against his landlord unless made with his landlord's consent ; that a sub-lease by a raiyat shall not be admitted to registration, if it purports to create a term exceeding nine years (seven years was the longest term for which an occupancy-raiyat could sub-let under section 38 of the Bill No. 11.) ; and that where a raiyat has without the landlord's consent granted a sub-lease by an instrument registered before the commencement of the Act, the sub-lease shall not be valid for more than nine years from the commencement of the Act." (S. C. B. 111.)

This section should be read with ss. 178 (3) (*e*) and 180 *post*.

Old law :—The Legislature here recognizes the right of a raiyat to sub-let his land ; so under the old law an occupancy-raiyat could sub-let his land without incurring forfeiture on that account—(Kalee Kishore *v.* Ram Churan, 9 W. R., 344; Haran Chunder *v.* Mookta Sundari, 10 W. R., 113: Jameer Gazee *v.* Coneye Mundal, 12 W. R., 110 ; 13 B. L. R., 278 note ; Khosal Mahomed *v.* Joynooddeen, 12 W. R., 451). Compare also 1 B. L. R., A. C., 81 ; but he could not by sub-letting alter the character of his holding and convert it into an under-tenure—(Karoo Lal *v.* Luchmeeput, 7 W. R., 15 ; Hureehur *v.* Jadu Nath, *Ib.*, 114) ; or make himself a middleman.—Durga Prosanno *v.* Kali Das, 9 C. L. R., 449. A raiyat having a right of occupancy could create a *mukarari* lease ; but the terms of a lease granted by him to a third party would only be binding as between them both

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(Damri *v.* Bissessar Lal, 13 W. R., 291), unless the landlord of the lessor gave the lessee power to sub-let, in which case the sub-lessee obtained rights against both, of which he could not be deprived without his own consent.—(Nihalunnissa *v.* Dhanu Lal Chaudhri, 13 W. R., 281.) Where a lessee sub-lets land, the sub-lessees can have no more right to use the land in contravention of the original lease than their lessor had.—(Monindra Chundra *v.* Moneeruddin, 20 W. R., 230.) A lessee cannot make a sub-lease for a longer time than his own lease.—(Hurish Chunder *v.* Sree Kalee, 22 W. R., 274). Nor can a farmer or lease-holder do so to the prejudice of the owner.—(Ranee Shurut Sundari *v.* Charles Binny, 25 W. R., 347; 3 C. L. R., 140; C. L. R., 5 I. A., 164.) Where a sub-lease specifies no term of tenancy, it cannot be construed to have effect beyond the interest of the grantor. —(Hurish Chunder *v.* Sree Kalee, 22 W. R., 274).

Present law:—These principles generally speaking apply to the present law.

All raiyats can sublet.

Under this section all raiyats are entitled to sub-let, but in order that the sub-lease may be valid against the landlord, it must comply with two conditions, e. g. (1) it must be by a registered instrument, and (2) it must not be for a term exceeding nine years.

The section speaks of a raiyat, which includes a non-occupancy raiyat as well. Under clause (*b*) of section 44, however, it appears that the landlord can protect himself against sub-lease by contract. The section seems to have been borrowed from clause (j) of section 108 of the Transfer of Property Act. A raiyat, however, does not include a sub-raiyat. It has been held under the old Act that the jummai rights of a kurpha under-tenant are not transferable without the consent of the landlord.—(Bonomali *v.* Koylash Chunder, I. L. R., 4 Cal., 135). The interest of a non-occupancy-raiyat in his holding is not heritable and therefore if a sublease is executed by a non-occupancy raiyat, it is rendered void by his death, even if the sublease is created by a registered instrument and is for a period of 9 years.—Karim Choukidar *v.* Sundar Bewa, 1 C. W. N., 89; I. L. R., 24 Cal., 207. Where a raiyat surrenders his holding, the landlord is entitled to re-enter by ejecting the under-raiyat if he is not protected by s. 85 or s. 86, cl. (*b*):—Nilkanta *v.* Ghatoo, 4 C. W. N., 667. In such a case no notice to quit is necessary.—*Ibid.*

Sub-lease by non-occupancy raiyat void by his death.

Effect of surrender by raiyat upon the under-raiyat.

Sublease for more than nine years void against landlord:—A sublease by a raiyat without the consent of the landlord, though created by a registered instrument, is wholly void; the only case in which a sublease created by a registered instrument without the consent of the landlord, though purporting to be for a longer period than nine years, is to be upheld for the period of nine years, reckoned from the commencement of the Bengal Tenancy Act, is where the document was registered before the commencement of the Act; in any other case, the validity of a sublease will have to be tested by the conditions imposed by this section, and there is nothing in the section authorising the Court to split the contract of subletting into two parts, a valid portion extending to a period of nine years, and an invalid portion for the

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remainder of the term:—Srikant *v.* Saroda Kant, I. L. R., 20 Cal., 46; where the grantor of the sublease purported to be a tenure-holder and it was created by a registered lease for more than nine years and it was found that the grantor was not a tenure-holder but a raiyat, *held* that the sublease was altogether void:—*Ibid.* It is equally void if the subletting was otherwise than by a registered document.—Peary Mohan *v.* Badul Chander, I. L. R., 28 Cal., 205; 5 C. W. N., 310. And a landlord purchasing the holding in execution of a decree for arrears of rent would be entitled to eject the raiyat without following the procedure prescribed by section 167 *post*,—*Ibid.*

Purchaser at a sale in execution of a decree for arrears of rent entitled to eject under-raiyats.

Where an occupancy raiyat executed a permanent registered lease in form of another, and put him in possession, and subsequently his right, title and interest were sold in execution of a decree for money, in a suit for ejectment against the tenant, it was held that the purchaser was not estopped from questioning the validity of the permanent lease created by his predecessor in title, and that as the permanent lease was registered contrary to the provisions of s. 85 (2) of the Bengal Tenancy Act, it must be regarded as unregistered and void under s. 17 of the Registration Act. It was further held that although written lease was viod under the law, yet in as much as the tenant had been put in possession of the land in good faith as an under-raiyat, he could not be regarded as a trespasser, but must be taken as an under-raiyat holding otherwise than under a written lease, and as the tenancy was subsisting, he could not be evicted except after service of notice under s. 49 of the Bengal Tenancy Act, and he could prove his tenancy right without proving his lease, if he had one which was inadmissible for want of registration.—Fazel Sheik *v.* Keramaddi, 6 C. W. N., 916.

Though void against landlord, valid against lessor:—Where a raiyat without the consent of his landlord, granted a sublease by an instrument registered before the commencement of the Bengal Tenancy Act, the sublease shall not be valid for more than 9 years from the commencement of the Act, as against the landlord, but not as against the raiyat.—Gopal *v.* Eshan, I. L. R., 29 Cal., 148. The judges observed in this case: 'This section, like some others, bears evident marks of compromise and, consequently, of somewhat hasty drafting. Sub-section (1) deals with sub-leases granted after the Act has come into force. It provides that, if a sub-lease is granted otherwise than by a registered instrument, it shall not be valid *against the landlord*, unless made with his consent. Sub-section (3) refers to sub-leases granted before the commencement of the Act. Sub-section (2) has no connection with sub-section (3), as it necessarily deals with sub-leases granted after the passing of the Act; for it directs that no sub-lease should be admitted to registration, if it purports to create a term exceeding nine years. It is contended that sub-section (3) must also be read with the light of sub-section (2), and that, if this is done, it will show that the intention of the Legislature was that sub-leases granted before the commencement of the Act, without the consent of the landlord, should be absolutely invalid against the whole world, and not merely as against the landlord. If this contention be correct, the result would be that a raiyat, who has

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obtained any benefit under the lease in the shape of a bonus, would be entitled to retain the same, although the lease in consideration of which he has received the same will be set aside at the end of nine years. The District Judge himself considers that, if sub-section (3) of section 85 is construed as he reads it, it would operate more harshly than the provisions of subsection (1). We also think that, if the construction contended for on behalf of the plaintiff is given effect to, under-raiyats whose sub-leases had been granted prior to the commencement of the Act would be placed in a far worse position than those who had acquired their sub-leases after the Act came into force. An under-raiyat taking a sub-lease for more than nine years after the commencement of the Act is put upon his guard by the refusal of the Registrar to register the document; if he has paid any consideration for such sub-leases he is enabled by the refusal of registration to recover the same from the lessor. But an under-raiyat who had taken a lease before the Act is in a very different position; he paid the bonus upon a contract which, when entered into, was perfectly valid in law. And if the Act *ipso facto* put an end to such a sub-lease at the end of nine years, the under-raiyat has no remedy against his lessor. Having regard to the consequences that would result from such an extreme construction of sub-section (3), and also the fact that in the interpretation of Statutes the Court must not impute to the Legislature a desire to confiscate or to do away with rights, which have already been lawfully created or which have lawfully vested, we are not prepared to agree with the opinion of the learned District Judge that the object of the Legislature was to sweep away, after the expiration of nine years from the date the Act came into force, all sub-leases granted by raiyats before the Act, if made without the consent of the landlord. There is certainly nothing in the law itself or in general principles to suggest that the Legislature intended to relieve grantors from their contracts. To give effect to the view expressed by the District Judge would be to allow frauds of a very gross character to be perpetrated by raiyats. They will be enabled to come forward under the authority of the law and ask that sub-leases deliberately granted by them may be declared invalid on the expiration of nine years from the commencement of the Act, without any commensurate return of the benefit they might have received. Such a construction, to our mind, does not seem to be warranted by the law. In our opinion sub-section (3) invalidates sub-leases granted before the Act without the consent of the landlord, as against the landlord, after expiration of nine years from the passing of the Act." The same view was adopted in another case: The words "the sublease shall not be valid" mean that the sublease shall not be valid against the landlord:—Madan Chandra *v.* Jaki Karikar; 6 C. W. N., 377.

Lease for an indefinite period: Ejectment by raiyat:—Where an under-raiyat holds under a written lease for an indefinite time the raiyat is not entitled to eject him by giving him a notice under s. 49 (6); he can be ejected only for non-payment of rent:—Madan Chandra *v.* Jaki Karikar, 6 C. W. N., 377.

Civil Procedure Code, s. 310 A: Non-agricultural land:—A suit does not

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lie by an under-tenant of non-agricultural land to recover from the tenant (his lessor), money which has been paid by him under s. 310 A, C. P. C., to set aside a sale of his lessor.—Bepin Behari *v.* Kalidas, 6 C. W. N., 336. See notes under s. 174.

Subsection (2): Registration rules:—See Appendix. The Registration department has framed the following rule with the view to the carrying out of the provisions of this sub-section:—"When a sub-lease executed by a raiyat, purporting to create a term exceeding nine years, is presented for registration, it shall be returned at once with a note to the following effect recorded on its back, *viz.*: 'Not admissible under sub-sec. 2, sec. 85 of the Bengal Tenancy Act (VIII of 1885).' The note shall be signed, sealed and dated by the registering officer."

Distraint:—See ss. 121, proviso (3), 136 (5) and 138 *post*.

Surrender and abandonment.

Surrender.

86. (1) A raiyat not bound by a lease or other agreement for a fixed period may, at the end of any agricultural year, surrender his holding.

(2) But, notwithstanding the surrender, the raiyat shall be liable to indemnify the landlord against any loss of the rent of the holding for the agricultural year next following the date of the surrender, unless he gives to his landlord, at least three months before he surrenders, notice of his intention to surrender.

(3) When a raiyat has surrendered his holding, the Court shall in the following cases for the purposes of sub-section (2) presume, until the contrary is shown, that such notice was so given, namely:—

(*a*) if the raiyat takes a new holding in the same village from the same landlord during the agricultural year next following the surrender;

(*b*) if the raiyat ceases, at least three months before the end of the agricultural year at the end of which the surrender is made, to reside in the village in which the surrendered holding is situated.

(4) The raiyat may, if he thinks fit, cause the notice to be served through the Civil Court within the jurisdiction of which the holding or any portion of it is situate.

(5) When a raiyat has surrendered his holding, the landlord may enter on the holding and either let it to another

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tenant or take it into cultivation himself.

(6) When a holding is subject to an incumbrance secured by a registered instrument, the surrender of the holding shall not be valid unless it is made with the consent of the landlord and the incumbrancer.

(7) Save as provided in the last foregoing sub-section, nothing in this section shall affect any arrangement by which a raiyat and his landlord may arrange for a surrender of the whole or a part of the holding.

The old Act:—The former law was laid down by s. 20, Act VIII (B. C.) of 1869, and s. 19 of Act X of 1859.

Application of the new section:—The section speaks of raiyats only, and not of tenants in general, see ss. 3, 4 and 5. Hence a tenure under a dur-mourosi mokurari lease of land which is not let for agricultural purposes cannot be put an end to by a mere relinquishment on the part of the lessee, although after notice to the landlord; the principle laid down in the case of Heeralal Pal *v.* Neelmony Pal, 20 W. R., 383, where it was held that a patnidar cannot of his own option relinquish his tenure, is applicable to all intermediate tenures between the zemindar and the cultivator of the soil, except those held on farming leases.—(Jadoonath *v.* Schoene, Kilburn & Co., I. L. R., 9 Cal., 671; 12 C. L. R., 343.) In Hiralal Pal *v.* Nilmoni Pal, 20 W. R., 383, it was observed: "The point which we reserved for consideration in this case is whether it is optional with a patnidar to surrender the patni, which he holds, at any time, and to plead such surrender in answer to a suit for a rent. We are clearly of opinion that, whether or not, the Civil Court might, upon sufficient ground, give relief in a suit brought to dissolve a contract between the zemindar and his patnidar, it is certainly not open to a patnidar of his own choice to throw up the patni, and, by so doing, escape his liability to pay rent. We do not say that the contract is indissoluble, because many circumstances might arise in which the interference of a Court of Justice might fairly be invoked to put an end to it; but the dissolution of such a contract must, we think, be an act of the Court and the result of proper enquiry, and cannot be taken by the patnidar alone and pleaded in answer to a suit for rent." So as regards farming leases, it was held in Raja Kishen *v.* Sankari Dasi (7 Sel. Rep., 174, o. e., 205, n. e.,) that if the landlord took steps to increase the rent, the tenant had a right to surrender the lease, even if perpetual, and avoid liability.

It does not apply to tenants other than raiyats.

Not bound by a lease or other agreement for a fixed period:—This section does not apply to cases where the raiyat has entered into a lease for a specific term; where, for instance, a raiyat had taken a lease, it was decided that he could not relinquish his holding during the currency of the lease.—(Kashee Sing *v.* Messrs. Onraet and Grant, 5 W. R., Act X, 80; Tiluk Patuk *v.* Mahabir Panday, 7 B. L. R., App.,

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11; 15 W. R., 454; Baboo Dwarka Dass *v.* Gopal Dass, 1 Agra Rev. Ap., 22). But a perpetual contract by a man on the part of himself and his heirs, and reciting that he or his heirs shall never relinquish the jote cannot operate against the law, which says that any raiyat may relinquish his jote if he does so in a legal manner.—(Gopal Chowdry *v.* Tarini Persad, 9 W. R., 89). This decision possibly holds good under the present section, for a perpetual contract is not an agreement for a fixed period —*vide* section 178. Sub-section (3), clause (c) of that section provides that nothing in any contract made between a landlord and a tenant after passing of this Act, shall take away the right of a raiyat to surrender his holding in accordance with this section. Where a joint lease was given to many persons with an entirety and equality of interest among the tenants, the resignation of some of the joint lessees does not necessarily operate to void the lease.—(Mohim Chunder *v.* Pitambur 9 W. R., 147). Where a member of a joint family is registered as jotedar in a zemindar's sherista, not as for himself only, but as manager for the family, his relinquishment of the jote is not sufficient in law to authorize the zemindar to make arrangements with any others he pleases.—(Bykunta Nath *v.* Bissonath 9 W. R., 268). An *istafa* given by a Hindu widow having infant sons cannot operate to destroy the title of the infants.—(Syud Wahid Ali *v.* Gour Mohan, 1 Hay, 553). A raiyat cannot relinquish a portion of his jote, keeping that portion only which may suit his convenience. He may either retain the whole or throw up the whole in conformity with the provisions of this section. But as long as he retains any portion of his jote he is liable for the rent of the whole.—(Saroda Sundari *v.* Mahomed Mundle; 5 W. R., X, 78; Arurulla *v.* Kailash I. L. R., 8 cal., 118). But when a raiyat, holding a considerable quantity of land, wishes to relinquish a portion, he must specify in his notice what portion he relinquishes in order to relieve himself of liability to pay rent.—(Habela Sircar *v.* Doorga Kant, 11 W. R., 456). Subsection (3), clause (c) of s. 178 *post* provides that nothing in any contract made between a landlord and a tenant after passing of this Act, shall take away the right of a raiyat to surrender his holding in accordance with this section. But the right of relinquishment is a privilege given to tenants, by means of which they may restrict the lease and establish their tenure upon a new basis or may extinguish the lease altogether; and the tenants can not avail themselves of that privilege to any extent, unless they strictly observe the conditions which are either expressed or implied in the lease:—Ram Churn *v.* Ranigunge Coal Association, C. W. N., 697, (P. C.) I. L. R., 26 Cal. 29. It is the relinquishment of the land and not the notice which relieves the raiyat from liability—(Nobin Chunder *v.* Lukhi Pria, 1 W. R., 20; 2 Board's Rep., 200.) The heirs of a deceased tenant having rights of occupancy who has died intestate, are liable for the rent unless they have surrendered the land or done something from which a surrender in the terms of this section can be presumed, and non-cultivation of the land does not necessarily amount to a surrender.—(Piari Mohan Mukhurji *v.* Kumaris Chandra Sarkar, I. L. R. 19 Cal., 790). See note to sec. 26, p. 94. There may be a valid surrender of an occupancy

Surrender by a co-sharer or by one not having full rights.

A part of the holding cannot be relinquished.

Liability of heirs to pay rent.

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holding without a written document. (Abdur Rahman *v.* Ali Hafiz, 5 C. W. N., 351).

Presumption of a notice:—Sub-section 3 contains a presumption that the notice was given. The reason of the presumption was thus explained: "The question is—when the raiyat had surrendered, is he to be held liable for the payment of the next year's rent? If he has given three months' notice, the answer is no; if he has not given it, the answer is yes; but we look to the object with which three months' notice is required, and we say if he has left the village, or if he has exchanged his holding for another, then the landlord has already received the information which the notice is intended to secure, and it is here that the presumption comes in. The presumption is not a presumption of surrender, but of service of notice. (*The Hon'ble Sir Steuart Bayley*).

Notice of intention to Surrender:—A verbal notice is sufficient under the present law, and it was so under the old law too.—(Mahomed Gazee *v.* Sunkurlal, 11 W. R., 53. Khondkar Abdar Rahman *v.* Ali Hafez, 3 C. W. N., 351; Imamgandi *v* Kamleswari, 13 I. A., 160; I. L. R., 14 Cal., 109. The mere use of the words "জনাকে বিলি কর" in conversation by the tenant, when called upon by the zemindar to pay increased rent, were held to be insufficient to constitute a relinquishment.—(Bonomali *v.* Delu Sirdar, 24 W. R., 118.) Where a landlord served a notice on an *ootbandi* raiyat that, unless he paid an enhanced rent for the ensuing year he was to quit the land, and the raiyat thereupon intimated to the landlord's agent his intention to relinquish the land, it was held that there was sufficient compliance with the provisions of s. 20, Act VIII of 1869 B. C.—(Kenny *v.* Ishur Chunder, Sp. W. R., Act X, 9.) Where a tenant is found to have taken steps required by law in furtherance of his intended relinqishment, it is for the landlord to prove his continued possession notwithstanding. But where it is found that the tenant has not gone through the necessary steps, it will be for him to prove that the landlord took possession of the land and enjoyed the profits holding it *khas*, or by letting it to others.—(Erskine *v.* Ram Coomar, 8 W. R., 221.) A raiyat is not required to give any notice under this section in a case where the raiyat holds under a lease which was for a limited period, which period has expired. After the expiry of the lease he has no right to hold, and is therefore perfectly justified in giving up possession. And a landlord claiming rent from such raiyat for a period after the expiry of his lease is bound to prove that the latter held on subsequently to the terms of the lease.—(Tilak Puttuk *v.* Mahabir Pandey, 15 W. R., 454.) A tenancy which is to continue year by year is a continuing tenancy so long as the parties are satisfied; and though terminable at the option of either party at the end of any year, is not *ipso facto* terminated at the end of every year. The tenancy shall not terminate, and the raiyat shall continue liable for rent unless he relinquishes it under the provisions of this section.—(Maloddee Noshyo *v.* Bullubee Kant, 13 W. R., 190.) The present law enjoins three months' notice previous to the end of the agricultural year [sub ss. (1) and (2) should be read together], while the old law enjoined Jyte Fusli or Pous Bengali to be the month when the notice ought to be served. "Agricultural year" is defined in cl. 11 of s. 3.

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Subsection (6) : Incumbrance :—The Select Committee reported :—"In dealing with surrender and abandonment, the only changes made by us which need here be noticed, are the provisions which we have inserted to check collusive surrender or abandonment in fraud of the rights of third parties. The necessity for this was brought to notice in para. 94 of the Bengal Government's letter of 15th September, where it is shown that raiyats not unfrequently sub-let the whole or a portion of their holdings in consideration of a large bonus for a term of years. To leave the interests of sub-lessees in such cases entirely at the mercy of the sub-lessor in collusion with his landlord, would do serious practical harm. We have therefore provided [section 86 (6)] that the surrender of a holding which is subject to a registered incumbrance, shall not be valid without the consent of the incumbrancer and the landlord, and in case of abandonment, we have provided [section 87 (4)] that the sub-lease shall only be avoided after the sub-lessee has had the opportunity of taking over for the unexpired period of his sub-lease the full rights and liabilities of his lessor in regard to the rent of his entire holding. These provisions appear to us to present the only method by which protection can be given to the sub-lessee without injury to the landlord, or without risking the conversion of these sub-leases into permanent transfers. In the case of sale in execution of a decree for rent, the sub-lessee has the same protection as other incumbrancers under Chapter XIV."

Collusive surrender to defeat strangers.

"The term 'incumbrance' used with reference to a tenancy means any lien, sub-tenancy, easement or other right or interest *created by the tenant* on his tenure, or holding or in limitation of his own interest therein, and not being a protected interest in s. 160;" see s. 161. In s. 161 of the Bengal Tenancy Act, the word "incumbrance" seems to be used as covering a lease.—Jogeswar *v.* Abed, 3 C. W. N., 13. See also Thakoor Das *v.* Nobin Kishen, 15 W. R., 552; Mahomed Askur *v.* Mahomed Wasuck, 22 W. R., 413; Gopendra Chunder *v.* Mokaddam, I. L. R., 21 Cal., 702. In order to satisfy the definition of "incumbrance" as given in s. 161, it must be the creation of the tenant and therefore when a mortgage is created not by an act of the tenant but by operation of law under s. 171 of the Act, it is not an incumbrance.—Pasupati *v.* Narayan, 1 C. W. N., 519; see notes under s. 161. If a raiyat creates a charge or mortgage or a sub-lease or any other kind of right or interest in derogation of his interest, and such "incumbrance" is secured by a registered instrument, a surrender by the raiyat will not be valid unless made with the consent of the landlord *as well as the incumbrancer*. Where the incumbrancer is not protected by s. 85 or by this sub-section (6), that is, when his interests are not secured by a registered instrument, the surrender is of no effect against the landlord. And in case the land is let to an under-raiyat the landlord would under these circumstances, be entitled to re-enter by ejecting him and no notice to quit would be necessary.—Nilkantha Chaki *v.* Ghatu Sheik, 4, C. W. N., 667.

Notice of Surrender :—For service of the notices of surrender referred to in sub-sections (2) and (4), see rule 9, Chap V, of the Govt. Rules, Appendix.

Court-fees :—Under cl. (12), sec. 19, Act VII of 1870, applications for service of notices of relinquishment are exempt from court-fees.

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Abandonment.

87. (1) If a raiyat voluntarily abandons his residence without notice to his landlord and without arranging for payment of his rent as it falls due, and ceases to cultivate his holding either by himself or by some other person, the landlord may, at any time after the expiration of the agricultural year in which the raiyat so abandons and ceases to cultivate, enter on the holding and let it to another tenant or take it into cultivation himself.

(2) Before a landlord enters under this section, he shall file a notice in the prescribed form in the Collector's office stating that he has treated the holding as abandoned and is about to enter on it accordingly ; and the Collector shall cause notice to be published in such manner as the Local Government, by rule, directs.

(3) When a landlord enters under this section, the raiyat shall be entitled to institute a suit for recovery of possession of the land at any time not later than the expiration of two years, or, in the case of a non-occupancy-raiyat, six months, from the date of the publication of the notice ; and thereupon the Court may, on being satisfied that the raiyat did not voluntarily abandon his holding, order recovery of possession on such terms, if any, with respect to compensation to persons injured and payment of arrears of rent as to the Court may seem just.

(4) Where the whole or part of a holding has been sublet by a registered instrument, the landlord shall, before entering under this section on the holding, offer the whole holding to the sub-lessee for the remainder of the term of the sub-lease at the rent paid by the raiyat who has ceased to cultivate the holding, and on condition of the sub-lessee paying up all arrears due from that raiyat. If the sub-lessee refuses or neglects within a reasonable time to accept the offer, the landlord may avoid the sub-lease and may enter on the holding and let it to another tenant or cultivate it himself as provided in sub-sections (1) and (2).

"The object of section 87 is to meet the difficulties which occur when a raiyat apparently abandons his holding, but in such circumstances as to give no assurance whether it is permanently abandoned or not. On the one hand, there is danger to the landlord of an action for dispossession, if he lets the land hastily to a tenant ; on the other hand, there is danger of temporary absence being taken advantage

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of by the landlord to effect the dispossession of a raiyat. To meet these two dangers, we provide that if a raiyat abandons his residence without notice and without arranging for his cultivation and payment of rent, the presumption is that he has abandoned his holding. The landlord can then, after filing a notice in the Collector's office, enter on the holding and let it to another tenant. We give, however, a term of two years in which the raiyat can sue for re-admission, and the Court may, on being satisfied that the raiyat did not voluntarily abandon his holding, order recovery of possession, on such terms as to payment of compensation and arrears of rent as it thinks fit. To protect third parties against collusive abandonment in fraud of their rights, we have provided in sub-section (4) that the sub-lease shall only be avoided after the sub-lessee has had the opportunity of taking over, for the unexpired period of his sub-lease, the full rights and liabilities of his lessor in regard to the rent of his entire holding." (*The Hon'ble Sir Steuart Bayley in Council.)*

Abandonment:—When a cultivating raiyat goes away from the land which he has occupied, and neither cultivates nor pays rent for it, the landlord is justified in assuming that he has relinquished the land. The relinquishment need not be in writing. If the land is leased out to another person, the former raiyat is not entitled to re-enter on possession.—Moneeruddin *v.* Mahomed Ali, 6 W. R., 67 ; Chandramani v. Sambhu Chandra, W. R., sp., 270 ; Harihar *v.* Jadunath, 7 W. R., 114 ; Nadiar Chand *v.* Modhu Sudan, 7 W. R., 153 ; Huro Das *v.* Gobind Bhuttacharjee [1869], 12 W. R., 304 ; 3 B. L. R., App., 123 ; Mutty Sunar *v.* Gundar Sunar [1873], 20 W. R., 129 ; Ram Chang *v.* Gora Chand Chang [1875], 24 W. R., 344 ; Boidya Nath Manjhi *v.* Aupuna Debi [1881], 10 C. L. R., 15 ; Golam Ali Mondal *v.* Golap Sundari Dasi [1882], I. L. R., 8 Cal., 612 ; S. C., 10 C. L. R., 499. But a partial or temporary non-cultivation is no evidence of abandonment.—Radha Madhub *v.* Kali Churan, 18 W. R., 41 . Nor is mere omission to pay rent.—Musayatullah *v.* Noorzahan, I. L. R., 9 Cal., 808 ; 12 C. L. R., 489; though non-payment of rent coupled with non-cultivation does. —*Ibid.* Mere non-payment of rent by an occupancy raiyat does not extinguish the tenancy or constitute an abandonment. —Obhoy Charan *v.* Kollash, I. L. R., 14 Cal., 751. Where land held by tenants with rights of occupancy was completely submerged for a number of years, and during the period of such submersion no rent was paid by the tenants, it was held, that the tenants had, by non-payment of rent during the period of submersion, forfeited their rights of occupancy.—(Hemnath *v.* Ashur Sirdar, I. L. R., 4 Cal., 894.) This case was however, examined and dissented from in Ismael Choudhry *v.* Bhagabut Barmanyer, appeal from original decree 303 of 1897, decided 25th June 1900, in which the case of Mozhar Rai *v.* Ramlal Sing, I. L. R., 18 All., 290 was approved, and it was held that non-payment of rent by occupancy-raiyats while their lands are under water does not furnish any ground for supposing that they have abandoned their holdings, if there are facts present to show that it was

Partial non-cultivation.

Nonpayment of rent.

Submersion.

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their intention to resume the occupation of their holdings on re-appearance. When the right is not transferable without the landlord's consent, a sale of the holding coupled with the fact that the raiyat quitted the land and ceased to cultivate it was regarded under the old law as abandonment and the landlord was held to be justified in recovering the land from the transferee.—Narendro Narain Roy *v.* Ishan Chunder Sen (1874), 22 W. R., 22 S, C., 13 B. L. R., 274; Ram Chander Roy Chowdhuri *v.* Bholanath Lushkur (1874), 22 W. R., 200. So under the present law if it be found that the raiyat has sold his holding and abandoned its possession, the landlord would be entitled to eject the transferee.—Robert Wilson *v.* Radha Dulari Koer (1897), 2 C. W. N., 63. It makes no difference whether the sale was voluntary or *in invitum* viz., a sale in execution of a decree.—Dwarka Nath Misser *v.* Hurrish Chunder (1879), I. L. R., 4 Cal., 925. But when an occupancy-raiyat, after the transfer of his right to a stranger takes a sub-lease from him and so remains in possession, it was held that this did not amount to abandonment so as to entitle the landlord to re-enter.—Sristidhur *v.* Madan Sirdar, I. L. R., 9 Cal., 648. Kabil Sardar *v.* Chunder Nath, I. L. R., 20 Cal., 590. This case was held not to apply to a case in which the original tenants had transferred their rights to persons, some of whom were in possession of the tenures upon payment of rent to the landlord or his ijaradars, in regard to the remaining lands of the tenures, "though the original tenants may be still in possession," they were in possession as subtenants of the transferees and had paid no rent to the landlord for last ten or eleven years.—Kali Nath *v.* Upendra Chunder, I. L. R., 24 Cal., 212, 1 C. W. N., 163. Even when the right of occupancy is transferable, the raiyat cannot transfer different parts of it to different persons, and in case of such transfer the landlord can treat the transferees as trespassers and eject them.—Tirthanand Thakur v. Mati Lal Misra, I. L. R., 3 Cal., 774. A purchaser of a portion of an occupancy holding has no right to bring a suit for recovery of possession of the same against the landlord, whether the holding is transferable or not; and the transfer is not binding on the landlord.—Kuldip Sing *v.* Gillanders, 4 C. W. N., 738; I. L. R., 26 Cal., 615. One of two proprietors of a jote having deserted the land, the other proprietor, while ostensibly in possession of the entire jote, relinquished it to the landlord who let it to the defendants. Some years after such relinquishment, the plaintiff, who claimed to have purchased the right of the proprietor who had relinquished, sued to eject the defendant on the ground that the relinquishment was not valid. It was held, that whether or not the relinquishment was in fact valid, the landlord was, under the circumstances, entitled to induct another tenant on the land, and that the plaintiff could not eject the defendant.—(Boidyanath *v.* Annapurna, 10 C. L. R., 15; compare Sheik Manirulla *v.* Sheik Ramzan, 1 C. L. R., 293.) A relinquishment made in favour of the landlord by some of several tenants of a joint occupancy holding does not operate by way of enlarging the right of the other

Transfer.

Sub-lease

Transfer of a part of the holding.

Abandonment by a co-sharer.

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co-sharers who did not relinquish, and depriving the landlord of what ordinarily would belong to him.—Peary Mohan Mondal *v*, Radhika Mohun Hazra, 8 C. W. N., 310.

Notice by landlord under section (2):—It is not the notice which terminates the tenancy, but the voluntary abandonment coupled with acts on the part of the landlord (not necessarily limited to the giving of notice) indicating that he considers the tenancy at an end, and it is for the Court in each case to determine whether the tenancy has terminated.—Lal Mamud *v*. Arbullah, 1 C. W. N., 198. Section 87 does not apply to a case in which, though the landlord has not followed the procedure prescribed by the section, the plaintiff is only a mortgagee of a part of a non-transferable jote.—Madan Mohan Ghosh *v*. Habi, 2 C. W. N., clxxxii. In this case the subordinate Judge had held that although the raiyat had admittedly abandoned the land, yet, as the landlord had given no notice as required by section 87, sub-section (2), the tenancy continued, and he could not settle it with anybody else. But the learned Judges of the High Court on this point expressed themselves thus :—" It is not easy to understand section 87, but it cannot bear any such construction as that. It does not purport to define an abandonment, or to give an exhaustive description of the acts which constitute an abandonment and we think it was not intended to apply to a case in which a raiyat transferred, and made over the possession of, his holding to some one else. That, if he had no right to make the transfer,it may or may not in law amount to an abandonment on his part, but it does not seem to be an act contemplated or provided for in the section." Where a non-transferable occupancy holding is sold in execution of a decree for money and the purchaser obtains possession of the land through the Court and pulls the huts of the tenant standing thereon and it is found that the tenant has abandoned the possession of the holding, *held* that in a suit for *khas* possession the landlord is entitled to succeed and a notice under s. 87 to the old tenant is not necessary:—Bhagaban *v*. Bisseswari, 3 C. W. N., 46. The provisions of this section are not exhaustive ; they apply only to cases in which a landlord takes possession of an abandoned holding without bringing a suit ; but they do not prescribe the only mode in which a holding can be abandoned.—Samujan *v*. Munshi Mahton, 4 C. W. N., 493.

Form of notice : Subsection (2) :- See schedule 1, to the Local Government rules. Appendix.

Subsection (3) : Limitation :—Under this sub-section an occupancy raiyat has two years from "the date of the publication of notice," and a non-occupancy raiyat has six months, within which he may institute a suit for recovery of possession of the land. If the landlord enters upon the land without taking the steps which sub-section (2) has provided for his protection, the period of limitation would (in the case of an occupancy holding), under Article 3, Schedule III of the Act, be two years from date of entry or ouster.

Subsection (4) : Position of Sub-lessee :—Even where the raiyat has abandoned the holding, the landlord has no right to enter upon the land, if in

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possession of a sub-lessee, without the assistance of the law.—Jumeer Ghazee *v.* Goney Mandel, 12 W. R., 110. If he does so dispossess the sub-lessee without the sanction of law, he commits trespass.—Dumri Shaik *v.* Bissesur Lal, 13 W. R., 291. Under the present section the continuance of the sub-lease, is dependent upon two conditions, (1) that the sub-lessee agrees to pay the rent which the raiyat, who has abandoned the holding, had to pay, and (2), that he pays up all the arrears due from that raiyat. If he refuses or neglects within a reasonable time to accept the offer, the landlord may enter on the holding and let it to another tenant or cultivate it himself, as provided in sub-sections (1) and (2). The time for the acceptance of the offer must be reasonable.

Sub-division of tenancy.

Division of tenancy not binding on landlord without his consent.

88. A division of a tenure or holding or distribution of the rent payable in respect thereof, shall not be binding on the landlord unless it is made with his consent in writing.

The old Act.—Section 26, Act VIII of 1869, B. C., and s. 27 of Act X of 1859, laid down: "Provided that no zemindar or superior tenant shall be required to admit to registry or give effect to any division or distribution of the rent payable on account of any such tenure, nor shall any such decision or distribution of rent be valid and binding without the consent in writing of the zemindar or superior tenant."

Subdivision of tenancy.—The existence of a custom in a particular district by which rights of occupancy are transferable will not justify a sub-division of a holding, and if the tenant subdivides and transfers to different persons the landlord is entitled to re-enter.—(Tirthanund Thakoor *v.* Mutty Lall, I. L. R., 3 Cal., 774.) But it has been held that the transfer by a raiyat with a right of occupancy of a part of his holding does not entitle the landlord to recover possession of the land transferred by ejecting the transferee, in the absence of evidence to shew that by custom such transfer is allowed.—Durga Prasad *v.* Doula Gazee, 1 C. W. N., 160. Although the landlord in such a case is not entitled to *khas* possession, he is yet entitled to a declaration that the transfer of a portion of his holding which has not been made with his written consent as is provided by this section is not binding on him.—Sheikh Guzafar *v.* Dalgleish, 1 C. W. N., 162. A suit for possession by declaration of title by the transferee of a portion of the holding against certain co-sharer landlords who had dispossessed him therefrom, was held not to be maintainable.—Kuldip Singh *v.* Gillanders &c., I. L. R., 26 Cal., 615; 4 C. W. N., 738. The position would be different in an action, under section 9 of the Specific Relief Act, to recover possession on proof of mere wrongful dispossession. —*Ibid.* A suit, however, for joint possession with other fractional holders will lie.—Mohesh Chandra v. Sarada Prosad, I. L. R., 24 Cal., 433. But the transferee of a part of a tenure is jointly liable with his co-sharer for the whole rent; for although the privity between the parties may be one of estate only, it is in respect of the whole

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of the tenure, though the transfer was of a part, by reason of the indivisibility of the tenure without the landlord's consent.—Jagmaya Dasi *v.* Girindra Nath Mukherji, 4 C. W. N., 590 ; Sourindra Mohan Tagore *v.* Ananda Moyi, I. L. R., 26 Cal., 103, C. W. N., 383. A zemindar is not bound to give effect to any sub-division of a tenure previously registered as undivided.—(Watson & Co. *v.* Ram Soonder, 3 W. R., Act X, 165 ; Upendra Mohan *v.* Thanda Dasi, 3 B. L. R., A. C., 349 ; 12 W. R., 263.) There are various ways in which a zemindar may recognise the division of a holding ; he may do so formally by dividing the holding into separate parts, or by implication by receiving rent from parties holding separately :—Ooma Churn *v.* Raj Luckhee, I.L.R., 25Cal., 19. A zemindar may, by accepting rent, assent to a transfer which involves a subdivision of a tenure.—Bharut Chunder *v.* Gunga Narain, 14 W. R., 211. Where a zemindar himself put up a tenure for sale in separate lots, and took rent from two of the purchasers separately, it was held that no written consent was necessary in order to his being bound to recognise the partition.—(Nobo Kishen *v.* Sreeram, 15 W. R., 255). The mere fact, however, of the landlord accepting rent from the different shareholders of the tenancy in proportion to their respective share, is no evidence of the landlord's having consented to the division.—(Gour Mohan *v.* Ananda, 22 W. R., 295.) And if alleged different tenures were indissolubly connected at the time of the original holder, and if the landlord, in receiving rent from the present holders, has dealt with them only as representatives of the original holder and as payers of component parts of the aggregate rental, he cannot be said to have accepted the division.—(Rani Lalan Mani *v.* Sona Mani, 22 W. R., 334). When tenants hold by different agreements the landlord has no right, without their consent, to break up existing holdings and redistribute lands so as to alter the extent and nature of the holdings ; and the mere fact of the raiyat having made payments according to the wish of the landlord to particular agents is not sufficient evidence from which the tenant's consent may be inferred, though that fact would be strongly corroborative, if there is other evidence of consent.—(Rahimaddi Akan v. Purna Chundra, 22 W. R., 336.) If an ijaradar or farmer assents to the division of a tenancy, it is binding on the landlord who let out in ijara.—(Harimohan *v.* Gorachand, 2 W. R., Act X, 25), unless there was collusion of the ijaradar with the tenant in fraud of the principal. In Abhai Charan v. Sashi Bhusan Basu, I. L. R., 16 Calc., 155, it was held under the present law that *dakhilas* or rent receipts showing that a tenant holds half the land at half the rent of the whole holding do not amount to the written consent required by this section. But the ruling in this case was distinguished in the Full Bench case of Piary Mohan Mukherji *v.* Gopal Paik (2 C. W. N., 375 ; I. L. R., 25 Calc., 531), in which it was laid down that a receipt for rent granted by the landlord or his agent in the form prescribed by the Bengal Tenancy Act, containing a recital that a tenant's name is registered in the landlord's *serishta* as a tenant of a portion of the original holding at a rent which is a portion of the original rent, amounts to a consent in writing by the landlord to division of the holding and to a distribution of the rent payable in respect thereof within the meaning of section 88 of this Act ; provided that, if the receipt has

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been granted by an agent, he has been duly authorised by the landlord to grant such a receipt.—See also Jagodiswar *v.* Joymand, 2 C. W. N., 37 note; I. L. R., 25 Cal., 533.

Consent of all landlords:—The consent referred to in this section must be the consent of the whole body of landlords, either actually or constructively. The consent of some of the landlords cannot validly effectuate the division of a tenure or holding or a distribution of the rent payable thereon.—S. A. No. 28 of 1897, heard on the 22nd and 27th June 1898, decided 7th July 1898.

Ejectment.

No ejectment except in execution of decree.

89. No tenant shall be ejected from his tenure or holding except in execution of a decree.

Old Act:—S. 21 of Act X of 1859 and s. 22 of Act VIII B. C. of 1869.

This section should be read with ss. 10, 18, 25, 44 and 49 *ante* and ss. 178 (1) (c) and 181 *post*.

Service Tenures:—S. 89 does not apply to service tenures, in as much as s. 181 *post* declares that "nothing in this Act shall affect any incident of a Ghatuali or other service tenure or in particular shall confer a right to transfer or bequeath a service tenure which before passing of this Act, was not capable of being transferred or bequeathed."—(Makdum Hossain *v.* Amer Sheik, I. L. R., 25 Cal., 131.)

Benamidar:—A suit for ejectment cannot be brought by a mere *benamidar*, he having neither title to, nor possession of, the property.—Issur Chandra *v.* Gopal, I. L. R., 25 Cal., 98; 3. C. W. N., 20.

Partial ejectment:—A landlord cannot eject a tenant from part of the subject of his tenancy and claim rent for the part remaining in his occupation.—Lalita Sundari v. Rani Surnamoyee, 5 C. W. N., 353; Haro Kumari *v* Purna Chandra, I. L. R., 28 Cal., 182.

Conversion of ejectment suit into rent suit:—Nor can a suit brought against tenants as trespassers be converted at the appellate stage into a suit for rent; it should be dismissed on failure of the plaintiff to prove his specific allegation.—Kali Kishore v. Gopi Mohun, 2 C. W. N., 166.

Remedies for illegal ejectment:—A tenant ejected otherwise than in accordance with this Act, can bring a possessory suit under sec. 9 of the Specific Relief Act, (I of 1877) within six months from the date of dispossession, but such a suit cannot be brought against Government. If he omits to do so, then, if an occupancy raiyat, he can sue within two years for possession under art. 3, Schedule III of this Act, or within two years from the date of the publication of the landlord's notice of re-entry under sec. 87, in which case he is not entitled to recover merely on proof of illegal ejectment without reference to his title.—(Madan Mohan Ghosh *v.* Habi, 2 C. W. N., clxxxii). If he is a non-occupancy raiyat, he can under the same

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section sue for recovery of possession within six months of the publication of this notice. In all other cases, the tenant can sue for recovery of possession within twelve years from the date of dispossession under art. 142, Act XV of 1877.

Court-fee:—Under clause xi of section 7 of Act VII of 1870, in a suit to recover the occupancy of land from which a tenant has been illegally ejected by the landlord, the amount of court-fee payable is to be computed according to the amount of the rent of the land to which the suit refers, payable for the year next before the date of presenting the plaint.

Measurements.

90. (1) Subject to the provisions of this section and any contract, a landlord may, by himself, or by any person authorized by him in this behalf, enter on and measure all land comprised in his estate or tenure, other than land exempt from the payment of revenue,

Landlord's right to measure land.

(2) A landlord shall not, without the consent of the tenant or the written permission of the Collector, be entitled to measure land more than once in ten years, except in the following cases, namely:—

(*a*) Where the area of the tenure or holding is liable, by reason of alluvion or diluvion, to vary from year to year, and the rent payable depends on the area;

(*b*) Where the area under cultivation is liable to vary from year to year and the rent payable depends on the area under cultivation;

(*c*) Where the landlord is a purchaser otherwise than by voluntary transfer, and not more than two years have elapsed since the date of his entry under the purchase.

(3) The ten years shall be computed from the date of the last measurement, whether made before or after the commencement of this Act.

The old Act.—The former law was contained in s. 25, Act VIII of 1869, which enacted that "every proprietor of an estate or tenure, or the person in receipt of the rents of an estate or tenure has the right of making a general survey and measurement of the lands comprised in such estate or tenure or any part thereof, unless restrained from so doing by express engagement with the occupants of the lands."

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"We have amended section 90 so as to make it clear that a landlord is not entitled to enter on and measure land exempt from the payment of revenue." (*S. C. B. III.*)

Landlord may measure:—The Legislature seems (from the report of the Select Committee) to have no idea of changing the existing law as to the person competent to measure the lands. The change of the words "every proprietor, &c.," into "landlord" is, however, significant. "Landlord" is defined in cl. (*4*) of s. 3 to mean "a person immediately under whom the tenant holds, and includes the Government." It includes therefore a proprietor as well as a tenure-holder subordinate to him. The section does not say the landlord of the manual occupant, and the subsequent words "estate" or "tenure" imply that he may be either a proprietor of the estate or the holder of a tenure. Under the old law, it was an open question whether a proprietor, not in receipt of the rents of the estate, was entitled to measure. It was held in one case that to entitle a proprietor of land to ask the assistance of the Court to enable him to measure his land, it is not necessary that he should show that he actually received the rents of his estate but only that he is in undoubted possession of the property.—(Raj Chunder *v.* Kishen Chunder, 4 W. R., Act X, 16.) A man who is the admitted proprietor of a mehal is not bound to show that he is in actual receipt of the rents at the time when he applies to measure the land. The words "in receipt of rent" in s. 25 of Act VIII of 1869 (B. C.) have no reference to the first part of the section, *i.e.*, to the words "proprietors of tenures and estates," but to the words "other persons" or other than those who are admittedly proprietors of the mehal or tenure within which lands to be measured are situated. The conjunction "or" is disjunctive, and not copulative.—(Ranee Kristo moni v. Ram Nidhi, 9 W. R., 331.) The words "every proprietor or other person in receipt of the rents," show that the proprietor who claims to measure must be a proprietor in possession, and not a proprietor out of possession, although he may be able to prove his title.—(Kalee Das *v.* Ramgati Dutt, 6 W. R., Act X, 10; *per* Peacock, C. J.) This section contemplates possession by the receipt of rents for those lands of which measurement is required.—(Pureejan Khatun *v.* Bykunta Chunder, 7 W. R., 96.) Where a person's right to measure is disputed by an intervenor, the only question for the Court to try is which of the two persons is in receipt of rent.—(Smith *v.* Nundunlal, 6 W. R., Act X, 13; 7 W. R., 188; Haradhun *v.* Hazee Mohomed, 6 W. R., Act X, 14.)—"It seems clear," observes Norman. J., "that the expression *in receipt of rents* in section 25 of Act VIII of 1869 (B. C.,) overrides both the prior members of the sentence and extend not only to 'other persons,' but also to *proprietors of the estate or tennre.*"—(Wise *v.* Ram Chunder, 7 W. R., 415.) A plaintiff who claims to measure is bound to show that he is a proprietor in possession in some way or other. It is not enough for him to be able to prove his title.—(Doorga Chunder *v.* Mahomed Abas, 14 W. R., 121, *per* Glover, J., contra *per* Mitter, J.) The Judges having thus differed in opinion in an appeal under the Letters Patent of the High Court, the judgment of Glover, J., was upheld. Norman, C. J., observed: "I do not for a moment suggest that it is necessary for a proprietor in the receipt of rents to be receiving

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rents every day in the year. If he once commences to receive rents and thenceforth continues to receive them at the time when the rents are ordinarily payable, he is undoubtedly the actual proprietor in receipt of the rents although it may have been some months since any rents were in fact paid to him. * * * This section is intended to provide for cases when a proprietor or other person in possession of an estate, is opposed in making measurement by the occupants of the land; and not for cases where the title of the person claiming the right to measure is a matter in question. We sould be very careful to prevent persons from taking an undue advantage of the provisions of this section, by using it, as a means of trying questions of title without paying the proper stamp duty, or of getting a sort of colorable possession by harassing or intimidating the raiyats."—(Doorga Churun *v.* Mahomed Abas, 14 W. R., 399.) Every zemindar has a right to measure all the land of his zemindary whenever he pleases, unless restrained from doing so by any express agreement.—(Khajeh Abdool Gunny *v.* Rajah Suttye Churun Ghosal, 2 W. R., Act X, 86; Ooma Churn *v.* Sibnath, 8 W. R., 14.) Any person who is a proprietor of an estate has the indisputable right of measurement unless restrained by any express agreement. The mere existence of under-tenures of any description does not take away his right of measurement. For instance, a zemindar, by granting *patni*, is not restrained from making a general survey and measurement of the lands comprised in his estate. So again a *patnidar* by creating a *durpatni* does not lose the right conferred upon him by this section.—(Run Bahadur *v.* Malloo Ram, 8 W. R., 149; Dwarkanath v. Bhowanee Kishore, 8 W. R., 11; Tweedie *v.* Ramnarain, 9 W. R., 151); a proprietor of a mehal is not barred from measurement by the fact of its being leased to a third party.—(Rani Kristomoni *v.* Ram Nidhi, 9 W. R., 331.) The abandonment to a grantee of all rights of measurement as against the raiyats with a view to resumption of lands within the taluk, does not apply to a measurement of the taluk itself as against the grantee, and does not amount to a restraint of the right of measurement within the meaning of this section.—(Kebul Kishen *v.* Jamini, 5 W. R., Act X, 47.) The right to measure can be exercised by any lessee or under-tenant who is in receipt of the rents of the estate.—(Watson & Co. *v.* Bhoonya Koonwar Narain, Sp. W. R., Act X, 185; 2 Board's Rep., 151.) If an estate be let to a number of tenure-holders, that circumstance was held upon construction of the words "entitled to receive the rents" not to be a bar to the exercise of the right.—(Brojendro Coomar *v.* Denobundhu, 9 C. L. R., 444; I L. R., 7 Cal., 684.) Every landlord has a right to measure under this section even if there is a mokuraridar between him and the tenant.—Matangini Dasi *v.* Ram Das, 7 C. W. N., 93.

Can a co-sharer measure:—A co-sharer in an undivided estate or tenure is not entitled to apply for measurement, for if each shareholder should have separate measurements it would be productive of great annoyance and harassment to the tenants in the estate.—(Mahomed Bahadur *v.* Rajah Rajkishen, 15 W. R., 522; Molook Chand *v.* Modu Sudan, 16 W. R., 126; Soorendra Mohon *v.* Bhuggobut Chundra, 18 W. R., 332; Santiram *v.* Bykunt, 19 W. R., 280; Peary Mohon *v.* Rajkishen, 20, W. R. 385; Ishan Chunder *v.* Basaruddin, 5 C. L. R., 132.) Where

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therefore, there are joint proprietors, the notice of an intended measurement of the lands must be a notice of all the joint proprietors. It is not sufficient that one co-sharer should give notice and make his co-sharer parties to the suit.—(Ishan Chunder *v.* Basaruddin, 5 C. L. R., 132.) But in Abdool Hosein *v.* Lal Chand Mahaton, 13 C. L. R., 313; I. L. R., 10 Cal., 36, it was held that a single co-sharer is competent to apply for measurement under s. 38 of Act VIII of 1869, B. C., if he make his co-sharers parties to the proceeding. There has been no decision on this point under the Bengal Tenancy Act but in Mahebali *v.* Ameer Rai, I. L. R., 17 Cla., 538, it was said that it was doubtful whether after passing of B. T. Act a co-sharer can apply for measurement.

Right to measure Lakhiraj lands:—A landlord had no right under s. 9, Act VI of 1862 (B. C.), to measure lakhiraj lands, as *lakhiraj* lands until resumed or assessed form a distinct and separate estate.—Prosunno *v.* Chunder Nath, 10 W. R., 361; Rung Lall *v.* Sreedhur, 11 W. R., 293; Golam Khejur *v.* Ershine & Co., 11 W. R., 445. Under the present section, as already pointed out, a landlord can measure all lands, rent-free or rent paying, comprised in his estate or tenure, but not revenue-free land.

Right to measure where there is intermediate tenant:—Every landlord has a right to measure under this section even if there is a mokuradar on the land; there was nothing in the old law which precluded the proprietor of an estate from making a general survey and measurement merely because his estate happened to be sublet to a number of tenure-holders.—Brojendra *v.* Krishna, 7 Cal., 684 (at p. 689), 9 C. L. R., 444; see also Baboo Run Bahadoor *v.* Muloram Tiwaree 8 W. R., 149; J. Tweedie *v.* Ram Narain, 9 W. R., 151. A kabuliyat was executed, before the passing of the Bengal Tenancy Act, by defendant No. 1, the holder of a dar-maurasi patta, in favour of his immediate landlord, a mukurraridar, providing that the former should have his name entered into the zamindar's serishta in place of the mukurraridar, and should pay rent direct to the zamindar, and also that, in case the area of the tenure should exceed a certain number of bigahs, he should pay rent on each excess bighas, at the rates of 12 annas and 2 annas, to the zamindar and the mukurraridar respectively. The agreement was ratified by the zamindar. On the zamindar suing defendant No. 1 for measurement of the tenure and for increased rent, it was objected that, under the kabuliyat, only the mukurraridar was entitled to sue for such measurement. The High Court held that under section 90 of the Bengal Tenancy Act every landlord had a right to sue for measurement, and that, as defendant No. 2 had accepted the zamindar as his landlord, he had made himself liable to be sued by him. It was held that, although the mukurraridar and the zamindar were both landlords of defendant No. 1, they were not joint landlords within the meaning of section 188.—Matangini Dasi *v.* Ram Das Matab, 7 C. W. N., 93.

Common Manager:—A common manager is entitled to measure.

Measurement of char-lands:—*Char, dearah, bhaoli* and *utbandi* lands can,

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under clause *(b)*, sub-section *(2)* of the present section, be measured as often as the landlord wishes.

Right of measurement with a certain pole :—In a proceeding under this section the order should be limited to one directing in the words of s. 91, that the tenants do attend and point out the land, and a declaration made in such order that the applicant to measure is entitled to make the measurement with a pole of a certain measure is bad in law and without jurisdiction.—Dya Gazi *v.* Ram Lall, 2 C. W. N., 351.

Proceeding under this section is not a suit :—A proceeding under this section is not a suit and the order passed in such a proceeding is not a decree as defined in the Civil Procedure Code:—Dya Gazi *v.* Ram Lall, 2 C. W. N., 351.

Appeal :—See notes under s. 91.

91. (1) Where a landlord desires to measure any land which he is entitled to measure under the last foregoing section, the Civil Court may, on the application of the landlord, make an order requiring the tenant to attend and point out the boundaries of the land.

(2) If the tenant refuses or neglects to comply with the order, a map or other record of the boundaries and measurements of the land, prepared under the direction of the landlord at the time when the tenant was directed to attend, shall be presumed to be correct until the contrary is shown.

Old Act :—See s. 37, Act VIII of 1869 B. C. and s. 90 of Act VI of 1862 B. C.

Subsection (1): Civil Court :—Under sec. 144 (2) the application for measurement must be made to the Civil Court which would have jurisdiction to entertain a suit for the possession of the tenure or holding in connection with which the application was brought. The jurisdiction in s. 37 of Act VIII of 1869 B. C., meant local, as pecuniary jurisdiction.—(Pearee Mohon *v.* Raj Kristo, 20 W. R., 385) The pecuniary value ought to be assessed upon the capitalized value of the excess rents which after the measurement applied for had been effected, the landlord expected that he would receive.—Lala Chedlal *v.* Ramdhun, I. L. R., 13 Cal., 57.

On the application of the landlord :—The Court must be careful to satisfy itself before granting its aid under this section that the zemindar's motive is *bonâ fide*, and is not to oppress the raiyats.—(Dwarkanath *v*, Bhawanee Kishore, 8 W. R., 11.) Under the former law, Act VI of 1869, B. C., a single suit to measure lands could be brought against several defendants, although their rights and tenures were different.—(Sashi Bhushan Banurji *v.* Nabo Kumar Chaturji, 8 W. R., 94). Also, where raiyats combined to withhold from the landlord information requisite to enable him to collect his due rents, one suit may be brought against a number of them, under the next following section, for measurement and ascertainment by the

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Collector of the details of the tenures of each raiyat.—(Solano *v.* Soobrun, 6 W. R., Act X.)

Appeal:—Under s. 37 of Act VIII B. C. of 1869, an order for measurement was a "decree" and therefore appealable.—Brajendra Kumar *v.* Krishna Kumar, I. L. R., 7 Cal., 684. But the proceeding under this section is not a suit and therefore not appealable.—Daya Ghazi *v.* Ramlal, 2 C. W. N., 351.

Subsection (2): Effect of the raiyat not attending:—A raiyat who refuses to attend and point out his land, is declared to be incompetent of afterwards contesting the correctness of the measurement or any of the proceedings held in his absence: but he would not be bound by such measurement, unless notice had been duly served upon him under this section.—Jadubchunder *v.* Etwari Lushkur, Marsh., 498; 1 Board's Rep., 143; Alimudin v. Kali Krishna, I. L. R., 10 Cal., 895. But under the present Act, finality is not given to a measurement and it is open to a tenant to rebut the presumption of correctness which the Court is directed to make, if he fails to attend when directed to do so.—Daya Ghazi v. Ram Lall Sukal, 2 C. W. N., 351.

Standard of measurement.

92. (1) Every measurement of land made by order of a Civil Court, or of a Revenue-officer, in any suit or proceeding between a landlord and tenant, shall be made by the acre, unless the Court or Revenue-officer directs that it be made by any other specified standard.

(2) If the rights of the parties are regulated by any local measure other than the acre, the acre shall be converted into the local measure for the purposes of the suit or proceeding.

(3) The Local Government may, after local enquiry, make rules declaring for any local area the standard or standards of measurement locally in use in that area, and every declaration so made shall be presumed to be correct until the contrary is shown.

Old law:—Formerly there had been conflicting decisions as to the power of the Collector to decide, in cases of dispute, what was the standard pole of the masurement of the pergunnah; but it is now decided by a majority of the Full Bench (Couch, C. J., Bayley and L. S. Jackson, JJ., dissenting) that where there is a dispute solely on the ground that the pole with which the measurement is attempted to be made, is not the standard pole of the measurement of the pergunnah, and the parties are at issue as to what is the length of the standard pole, the Collector has jurisdiction to enquire into and decide as to what is the true lengh of the standard pole.—Srimati Manmohini Chowdrain v. Prem Chand, 6 B. L. R., 1; 14 W. R., F. B., 5. Under the present section, the same question will arise in the conversion

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of the acre to the local measure under sub-s. (2). In determining the question of the length of the standard pole, due credit must be attached to the Canoongoe papers which have always been recognized to be of great weight in questions connected with pergunah rates, standards of measurements and similar statistics; and it is no ground for rejecting these papers, that the local *hat* does not correspond with the English cubit of 18 inches: for the *hat* varies in length in different pergunahs.—(Nund Dundpat *v.* Tara Chand Prithihari, 2 W. R., Act X, 13.) It sometimes indeed happens that there are two different standards of measurement in the same pergunnah and when this is the case, the standard which is current in a particular locality or *tuppah* must be followed—(Bhagabati Churun *v.* Tameeruddin Moonshi, 1 W. R., 225; Sarbanund Pandey v. Ruchia, Pande 4 W. R., Act X, 32).

Standards of measurement :—There are great varieties of local standards of measurement. The standard *bigha* in Lowar Bengal generally is one of 14,400 square feet (1600, square yards) or 20 poles (*laggis*) in length by 20 poles in breadth, the pole being 6 feet in length. In some parts of Bihar, where rent is paid at a certain rate per *bigha*, the *bigha* also consists of 400 square poles (*laggis*), but the pole (*laggi*) may be of any length from 4 *háths* (cubits) up to 9 or more; and the length of the *hâth* itself, or nominal cubit of 18 inches, is often determined in practice by the length of the forearm of a particular individual in the village.

Acre :—One standard bigha is equal to 14,400 square feet or 1,600 square yards;—100 bighas are therefore equal to 33 acres (an acre being considered to be equal to 4,840 square yards). An acre is a quantity of land, containing 160 square rods or perches, or 4,840 square yards. This is the English Statute or imperial acre which is employed over the United Kingdom and its colonies and in the United States, though Scotland and Ireland have respectively an acre of their own which is still to some extent used in measurements. The Scotch acre is larger than the English as it contains 6104.128 square yards, 48 Scotch acres being equal to 61 English acres. The Irish acre is also larger than the English, inasmuch as 100 Irish acres are nearly equivalent to 162 English acres.—(Ogilvie's Imperial Dictionary of The English Language.)

Board of Revenue's instructions :—"The standard of measurement or laggi recorded in the Collectorate for the pargana or other local division in which the lands are situated shall be taken as the local standard of measurement under section 92 (1) of the Tenancy Act, unless another standard is set up by either of the parties, in which case the Settlement Officer will after such summary inquiry as he thinks fit, decide what standard to adopt." But if the standard thus adopted is disputed, or if areas determined according to that standard are disputed, any person aggrieved may, where a settlement of land revenue is not being made or about to be made, institute a suit before the Revenue-officer under section 106 (*post*), and the Revenue-officer is bound to hear and decide the dispute as a civil suit, and thus to determine on the evidence what the real standard is by which the rights of the parties are regulated.

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Managers.

Power to call upon co-owners to show cause why they should not appoint a common manager.

93. When any dispute exists between co-owners of an estate or tenure as to the management thereof, and in consequence there has ensued, or is likely to ensue,

(*a*) inconvenience to the public, or

(*b*) injury to private rights,

the District Judge may, on the application in case (*a*) of the Collector, and in case (*b*) of anyone having an interest in the estate or tenure, direct a notice to be served on all the co-owners, calling on them to show cause why they should not appoint a common manager:

Provided that a co-owner of an estate or tenure shall not be entitled to apply under this section unless he is actually in possession of the interest he claims, and, if he is a co-owner of an estate, unless his name and the extent of his interest are registered under the Land Registration Act, 1876.

Old Act:—This section has been borrowed from Regulation V of 1812. Section 26 of that Regulation provided:—

"In any case in which it is shown to the satisfaction of a District Judge that inconvenience to the public or injury to private right has ensued, or is likely to ensue from disputes subsisting among the proprietors of a joint undivided estate, it shall be competent to such Judge, upon the application of the Revenue-authorities or of any individual having an interest in such estate, to appoint a person duly qualified and under proper security to manage the estate, that is, to collect its rents, and discharge the public revenue and provide for the cultivation and future improvement of the estate." And s. 27 laid down:—"It shall also be competent to such Judge to remove such manager, if the Revenue-authorities or any individual having an interest in the estate be at any subsequent time dissatisfied with his conduct and representing the circumstances of his case, move such Judge for his removal." See also Regulation V of 1827 and Act XV of 1874.

District Judge's powers:—The power vested in the District Judge by section 93 and the following sections is of a quasi-judicial character. And an application under section 93 is not a suit within the meaning of section 143 (*post*), as the operation of that section is confined to suits between landlord and tenant. Accordingly, an order rejecting or granting an application for the appointment of a common manager is not applicable.—Hossein Box v. Matukdharee Lal, I. L. R., 14 Cal., 312. But if an order is made in contravention of the law and is consequently *ultra vires*, the High Court can interfere under section 622 of the Code of Civil Procedure.—Ganodakanta v. Prabhabati, I. L. R., 20 Cal., 881.

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Application by a number of co-sharers:—In Fazel Ali Chowdhuri v. Abdul Mazid Chowdhuri, I. L. R., 14 Cal., 659, one application was made jointly by twelve of the co-sharers of a certain property under this section calling upon the four remaining sharers in the property to show cause why a common manager should not be appointed to certain property consisting of 243 estates or taluks, of which about 60 bore separate numbers on the Collector's Land Register, whilst other portions of the property were taluks and dependent tenures, *howlahs* and raiyati holdings, and therefore, did not appear in the Collector's Register at all, *held* that there need not be as many applications as there are estates, but the applicants should be called upon to state whether all of them are entitled in common to the various estates and tenures mentioned in the application, and if not, to divide themselves into as many groups as there may be properties held by them in common and in the latter case it would be necessary that each group of shareholders should put in separate applications. Separate Court-fees are to be levied if separate applications have to be put in the above circumstances,—*ibid*; the notice in the case of tenure will be as provided by this section and it will be of the same character and to the same effect as in the case of estates.—*Ibid.*

Court-fee.

Notice.

94. If the co-owners fail to show cause as aforesaid within one month after service of a notice under the last foregoing section, the District Judge may make an order directing them to appoint a common manager, and a copy of the order shall be served on any co-owner who did not appear before it was made.

Power to order them to appoint a manager, if cause is not shown.

95. If the co-owners do not, within such period, not being less than one month after the making of an order under the last foregoing section, as the District Judge may fix in this behalf, or, where the order has been served as directed by that section, within a like period after such service, appoint a common manager and report the appointment for the information of the District Judge, the District Judge may, unless it is shown to his satisfaction that there is a prospect of a satisfactory arrangement being made within a reasonable time,—

Power to appoint manager if order is not obeyed.

(*a*) direct that the estate or tenure be managed by the Court of Wards, in any case in which the Court of Wards consents to undertake the management thereof, or

(*b*) in any case appoint a manager.

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Appointment of manager: Consent:—A proper application was made to the District Judge under section 93, by some of the co-owners, for the appointment of a common manager, and notice was served on all the co-owners, to show cause why the application should not be acceded to, and no cause was shown; but eventually after giving the parties time to come to an arrangement, the District Judge, by consent, more or less express, appointed a common manager, it was held that the appointment was valid.—Jagat Chundra v. Goluk Chundra, I. L. R., 23 Cal., 522. The learned Judges observed:—

"It would, no doubt, have been better if the Judge had under section 94 made an order directing the parties to appoint a common manager; but his omission to do that does not, we think, in any way invalidate the order or diminish the scope of it. The manager was not a manager appointed by the parties, but by the District Judge, although, no doubt, the parties agreed to the appointment of the particular person selected; and in pursuance of that order the manager assumed and has retained up to the present time the management of the properties. It could not, we think, be contended with any success that Bhabani Nath Rai could, so long as that order was in force, himself collect the rent payable on account of his three annas share; and if, he could not do that, the person who has derived title from him as *patnidar* is not in any better position. He took *patni*, as the Judge remarks, knowing that the property was under the charge of a common manager appointed by an order of the Court, an order which under clause (3) of section 98 would have the effect of preventing any of the co-owners from themselves realising the rents due to their respective shares. If we were to hold that a person taking a lease of the shares of one of the co-owners after the appointment of a common manager could realise his own share of the rent, we should hold in effect that it would be open to any co-owner to defeat at his pleasure the sole object for which a manager is appointed."

The case is different where the parties, while objecting to the appointment of a common manager, agreed that the property should be made over to the Court of Wards, and under an order of the Judge it was made over to the Court of Wards, which assumed the management and continued it for some time, but afterwards gave it up. It was held that an order of the Judge appointing a common manager without taking any further proceedings under s. 93 was bad and the consent by virtue of which the Court of Wards took charge was limited to the Court of Wards, and did not give the Judge power to appoint any other manager.—Ganada Kanta v. Probhabati, I. L. R., 20 Cal., 881.

Order to deliver accounts and papers to manager:—There is no provision in this Act, authorising a District Judge, when an order under sec. 95 of this Act appointing a common manager has been made, to institute an enquiry as to the existence of certain accounts and papers and to examine persons on oath in such a proceeding, and a person giving false evidence in such a proceeding does not commit an offence under sec. 193 or sec. 199, Penal Code.—Abdul Mazid v. Krishna Lal Nag, I. L. R., 20 Cal., 724.

Powers of common manager:—A common manager, appointed under the

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provisions of the Bengal Tenancy Act, has power to mortgage property with the permission of the District Judge.—Amar Chunder v. Roy Goloke Chunder, 4 C. W. N., 770. The powers of the manager regarding sale or the grant or renewal of a lease stand on one and the same footing and are subject only to the condition precedent that he must obtain the express sanction of the District Judge.—*Ibid* (at p. 774). Collection of rent is part and parcel of the management of an estate and it is so recognised in Reg v. of 1812.—Magbul Ahmed v. Girish Chunder, I. L. R., 22 Cal., 634 & 637.

Powers of co-owners during common management:—While the common management exists, the powers of the co-owners must be regarded as in abeyance, and therefore a mortgage created by a co-owner during the existence of the common management cannot in any way interfere with, or derogate from, the rights created under any transaction made by the common manager with regard to the joint property.—Amar Chunder v. Roy Goloke Chunder, 4 C. W. N., 769.

Manager must register his name:—A manager who is appointed under this section must get his name registered under s. 78 of the Land Registration Act before he can recover rent from the tenants.—Maqbul Ahmed v. Girish Chunder, I. L. R., 22 Cal., 634.

Manager's right to recover possession:—A common manager appointed under section 95 is competent on behalf of the co-owners to sue for recovery of possession of land.—Sibo Sundari Ghose v. Raj Mohun Guho, 8 C. W. N., 214.

Power to nominate person to act in all cases under clause (b) of last section.

96. The Local Government may nominate a person for any local area to manage all estates and tenures within that area for which it may be necessary to appoint a manager under clause (b) of the last foregoing section; and, when any person has been so nominated, no other person shall be appointed manager under that clause by the District Judge, unless in the case of any estate the Judge thinks fit to appoint one of the co-owners themselves as manager.

The Court of Wards Act, 1879, applicable to management.

97. In any case in which the Court of Wards undertakes under section 95 the management of an estate or tenure, so much of the provisions of the Court of Wards Act, 1879, as relates to the management of immoveable property shall apply to the management.

98. (1) A manager appointed under section 95 may, if the District Judge thinks fit, be remunerated by a fixed salary or percentage of the money collected by him as manager, or partly in one way and partly in the other, as the District Judge from time to time directs.

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(2) He shall give such security for the proper discharge of his duties as the District Judge directs.

(3) He shall, subject to the control of the District Judge, have, for the purposes of management, the same powers as the co-owners jointly might but for his appointment have exercised; and the co-owners shall not exercise any such power.

(4) He shall deal with and distribute the profits in accordance with the orders of the District Judge.

(5) He shall keep regular accounts, and allow the co-owners or any of them to inspect and take copies of those accounts.

(6) He shall pass his accounts at such period and in such form as the District Judge may direct.

(7) He may make any application which the proprietors could make under section 103.

(8) He shall be removable by the order of the District Judge, and not otherwise.

Rule made by the High Court:—The following rule has been made by the High Court under s. 100 with regard to the power of a manager to sell or mortgage any property:—"No manager shall have power to sell or mortgage any property, nor shall he grant or renew a lease for any period exceeding three years, without the express sanction of the District Judge: Provided that this rule shall not render valid any lease for a shorter time than three years, if such lease is disapproved by the District Judge, or if the District Judge directs that his sanction is to be obtained as regards all leases granted by the manager."

Power of manager to mortgage:—The powers given by this section to a manager of joint property appointed under section 93 "for the purposes of management" include the power to mortgage or to sell the property:—Amar Chandra Kundu v. Shoshi Bhusan Ray I. L. R., 31 Cal., 305 P. C.; s. c. 8 C. W. N., 225 P. C.

Subject to the control of the Judge:—The restraint put upon the co-owners by this section, whilst the estate is under management, is co-extensive with the power conferred on the manager: it does not extend to the exercise of individual rights.—Amar Chandra Kundu v. Shoshi Bhusan Roy I. L. R., 31 Cal., 305 P. C.; s. c. 8 C. W. N., 225 P. C.

Power to restore management to co-owners.

99. When an estate or tenure has been placed under the management of the Court of Wards, or a manager has been appointed for the same under section 95, the District Judge may at

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any time direct that the management of it be restored to the co-owners, if he is satisfied that the management will be conducted by them without inconvenience to the public or injury to private rights.

Power to make rules.

100. The High Court may, from time to time, make rules defining the powers and duties of managers under the foregoing sections.

For rules made by the High Court under this section, see Appendix.

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CHAPTER X.

Record-of-Rights and Settlement of Rents.

The Government of India in their Despatch to her Majesty's Secretary of State for India No. 6 of the 21st March 1892, para. 100, observed upon the question of recording rights :

"Where local officers possess a full and accurate knowledge of local facts, and where they are therefore able to pursue a vigorous method of administration, these advantages are very commonly due to their being supplied with information relating to the detail of every field, and to the existence of numerous and disciplined bodies of subordinate native officials who are able to collect the various particulars within their cognisance as materials to suggest fairly safe generalisations. Whether we have regard to the prevention of famine, or to the waste of life or waste of money which may directly result from official ignorance or uncertainty so as to approach the dimension of famine ; whether we look to the need for active administration, which shall search out and expose deep-seated evils or to the lack of some solid assurance that facts affecting agricultural interests shall be so notorious and indisputable that none shall be able to pervert them to the injury of the weak, we perceive, in the circumstances of many portions of Bengal, and particularly of Behar, strong reasons for placing the Bengal officials on a level, in point of administrative advantages with their brother officers in other provinces. We seek no fiscal advantage but the prevention of diminution of human suffering."

Referring to this, the Secretary of State remarked in his Despatch :—

"While fully admitting the advantages which would attend the establishment of village records and accounts, the formation of a record-of-rights, and the introduction of a field survey, I cannot avoid the apprehension that the difficulties of carrying out these measures in those parts of Bengal in which village accounts and accountants, if they ever existed, have long ago entirely disappeared, even from tradition and remembrance, may prove greater than you anticipate. Your present proposal, however, merely contemplates an experimental commencement of the work in the Patna Division of the province of Behar, where the need for it is, you think, most pressing and the conditions least unfavourable ; and to this I will make no objection."

The provisions of this Chapter were thus summarized in Council :—

"What we have done then, has been to give the Revenue-officer, in the first instance, power to settle all disputes that may come before him. Where no dispute arises, he will record what he finds, he will not alter rents, and his entries will only have a presumptive value in cases afterwards brought before the Courts ; where a dispute arises, he will decide it, on the same grounds, by the same rules, and with the same procedure, as a Civil Court. His decision will be liable to appeal like that of the ordinary Civil Court to a Special Judge, who may or may not be the Judge of the district, and will be subject to a further special appeal to the High Court. In appeal the High Court may settle a new rent, but in so doing, is to be guided by the other rents shown in the rent-roll. In other words, there can be no second appeal to

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the High Court merely on the ground that the rent has been pitched too high or too low; but if a second appeal is preferred, as it may be, on the ground that the special Judge, owing to some error on a point of law, has, for example, found the holding to comprise more land or less land than it actually does comprise, or has given the raiyat a wrong status, and the appellant succeeds, the High Court can, without altering the rates, reduce or increase the rent, as the case may be. The decision of the Revenue-officer in disputed cases, subject to these appeals, will have the effect of a judgment of the Civil Court, and will be *res judicata*, thus barring a fresh suit for enhancement for 15 years. In section 103 we have given a special power to landlords to have this procedure applied, on depositing the expenses, to individual estates, and we apprehend that in the cases of auction-purchasers who are met by a combination of their tenants and are unable to get at the papers of their predecessor, this power will be found very useful. In sections 105 and 106 we had made ample provisions for the publication of the record and for hearing objections, so as to eliminate the danger of any one being prejudiced by entries made behind his back. All this applies to ordinary settlements which may be undertaken either by direction of the Government of India, or by order of the Local Government on the application of the parties, or in the case of serious disputes, or in Court of Wards or Government estates or where an estate is under settlement. In fact, this procedure is the only procedure which will now be at the disposal of Government for the purposes of a revenue settlement. But this procedure allows of no alteration of rent except on the application of the individual land."

Settlement of rent.

The following instructions of the Board of Revenue from the Survey and Settlement Manual will elucidate the question of settlement of rent :—

Explanation of the term settlement.

1. The term "settlement" in these rules in its general sense includes all the operations for the preparation of a record-of-rights, such as may be made for the settlement of land revenue, or in private or Wards Estates under s. 101 (1) or 102 (2) (*a*), (*b*) and (*c*), and s. 103 of the Tenancy Act. In its special sense the term is applied to (*a*) a settlement of the amount of land revenue payable to Government, or (*b*) a settlement of fair rents payable to landlords, which may or may not be made with a view to determine the amount of land revenue payable to Government.

Settlement of rent.

2. In the Bengal Tenancy Act, the term "settling a rent" implies the judicial determination of a rent payable for a term of years, and is used in contradistinction to the term "recording a rent," which implies the ascertainment and record of the existing rent.

Explanation of rent and revenue.

3. Rent as defined in the Tenancy Act, is whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord (which term includes Government) for the use or occupation of the land held by the tenant. When the paramount title of the State carrying with it the right to receive revenue and the proprietary right to receive rent unite in Government, the proprietary interest becomes merged in the paramount title; and rent, in such cases, becomes revenue (see also s. 2 of Act V. B. C. of 1894).

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4. The chief object of a settlement of "land revenue" may be defined to be the determination of the amount of revenue payable by proprietors, tenure-holders, or raiyats, directly to Government, whether under the denomination of revenue or rent. (Chap. I, Pt. III.)

Settlement of land revenue.

The following are preliminary instructions for settlement of land revenue :—

1. The revenue of the greater part of the territories subject to the Lieutenant-Governor of Bengal, having been fixed in perpetuity by the Regulations of the Permanent Settlement, is not liable to alteration or re-settlement.

What lands are liable to settlement of land revenue.

The following lands, however, are liable to assessment or re-assessment and settlement of land revenue :—

1st.—Waste-lands of which the revenue has never been settled.

2nd.—Temporarily-settled estates or tenures the property of Government or of private individuals (on expiration of the term of the current settlement).

3rd.—Estates or tenures purchased on account of, escheated, or forfeited to, Government.

4th.—Resumed revenue-free lands.

5th.—Islands thrown up in navigable rivers under certain conditions.

6th.—Alluvial accretions.

7th.—Lands acquired, but no longer required for public purposes.

8th.—Lands annexed by conquest.

2. The rules in the Manual do not apply to settlements of waste-lands (such as those of the Sundarbuns or the Western Duars of the Darjeeling Terai) which are governed by the rules for waste-land grants (see the Waste-land Manual). But they will apply to waste-lands comprised in, and forming part of, an ordinary estate or tenure, which are settled as part of such estate or tenure and not according to the waste-land rules.

Waste-lands.

Special rule for the survey and settlement of alluvial accretions will be found in Appendix H.

3. All lands coming under settlement of land revenue may, as regards proprietary right, be divided into two classes: *First*, those in which the proprietary right vests in Government; and *second*, those which are the property of private persons. The proprietary right vests in Government in the following cases :—

Classification of land coming under settlement according to proprietary right.

(1) Waste-lands which have never been settled.

(2) Lands escheated in default of legal heirs or claimants.

(3) Lands forfeited to Government for certain offences against the State.

(4) Islands thrown up in navigable rivers. Under certain conditions such islands belong to Government by law.

(5) Lands purchased by Government.

(6) Lands acquired for public purposes:

(7) Lands appropriated by zemindars for keeping up thanas or police establishments when resumed in consequence of the proprietors having been

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exonerated of the charge of keeping the peace (*vide* cl. 4, s. 8, Reg. I of 1793).

(8) Lands annexed by conquest when proprietary rights have not been recognised as vesting in private individuals.

4. The proprietary right vests in private individuals in the following cases of lands which may come under settlement :—

(1) Lands, the land revenue of which has been temporarily settled with the proprietors.

(2) Resumed revenue-free lands.

(3) Resumed towfir lands, *i.e.*, lands which, at the period of the decennial settlement, were not included within the limits of an estate for which a settlement was concluded with the owners, but which on enquiry are found in the possession and occupation of private proprietors.

(4) Alluvial accretions to temporarily or permanently-settled estates.

The process of settlement, however, is not materially affected by the class to which the estate belongs in respect of proprietary right. That question has an important bearing on the calculation of the Government share in the assets and on the selection of the person to be held responsible for payment of the Government revenue ; but the operations of measurement, enquiry into amounts of current rents or rates of rent, and the process of record of the rights and interests of tenants are not affected by the class of the estate, *i.e.*, whether Government or private.

Classification of settlements of land revenue according to the laws under which they are conducted.

5. As regards the laws and procedure under which they are conducted, land revenue settlements may in ordinary districts be divided into four classes :—

1st.—Settlements of land revenue merely, in lump sums, which may be made without a record of raiyat's rents or rights.

2nd.—Settlements under the Regulations or under Act VIII (B. C.) of 1879 in districts in which the Bengal Tenancy Act is not in force, embracing enhancement of rents where necessary.

3rd.—Settlements under the Regulations not repealed by the Tenancy Act in estates or tenures where, though the Tenancy Act is in force, it is decided not to take action under Chap. X of the Act, but to record existing rents under the Regulations or to obtain enhancements by mutual agreement under s. 29 of the Tenancy Act.

4th.—Settlements under Chap. X of the Tenancy Act, in which existing rents are recorded and fair rents settled under s. 104 (2) of the Act.

Settlement of land revenue in lump sums.

6. Settlements of the first kind ordinarily include—

(*a*) Settlements of uncultivated and unoccupied lands.

(*b*) Settlements of alluvial lands, as an island thrown up in a navigable river which is taken possession of on behalf of Government. Such lands may be leased to a farmer for a term of years at a lump rental. Such settlement is based on the law of contract.

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Settlement of land revenue under the Regulations of special laws.

7. Settlements of land revenue of the second class, under the Regulations, apply in districts or parts of districts in which the Tenancy Act is not in force, and they may, or may not, involve enhancement of rents.

The following are the principal Settlement Regulations in force in the greater part of these Provinces:—

Regulations I and VIII of 1793;
" V and XVIII of 1812;
Regulation VII of 1822;
Regulation IX and XI of 1825;
Regulation IX of 1833;

The districts in which the Bengal Tenancy Act is not at-present (1895 A. D.) in force are:—

Balasore, * Puri, * Cuttack, * Angul, Darjeeling, Jalpaiguri, Hazaribagh, Lohardaga, Palamau, Manbhum, Singhbhum, the Chittagong Hill Tracts, the Sonthal Parganas, and the Town of Calcutta. In Balasore, Puri, Cuttack, Jalpaiguri (*i. e.* the tract south of the Teesta), and Manbhum, Act X af 1859 and its amending Acts [VI (B. C.) of 1862 and IV (B. C.) of 1867] are in force. In the districts of the Chota Nagpur Division the provisions of the Chota Nagpur Tenures Act [II (B. C.) of 1879], and in Hazaribagh, Lohardaga, Palamau, and Singhbhum those of the Chota Nagpur Landlord and Tenant Procedure Act I (B. C. of 1879 are in force. In the Sonthal Parganas the Sonthal Parganas Settlement Reg. III of 1872 and the Rent Reg. II of 1886 are in force.

Laws regulating settlements where Tenancy Act is not in froce.

8. The sanction for settlement-proceedings of the second class, in the districts in which the Bengal Tenancy Act is not in force, is to be found in the Settlement Regulations specified in Rule 7 of this chapter and in the Special Settlement Laws, read with the Rent Laws, which are in force in them severally.

The following are the special Regulations and Laws applicable to settlements in these districts:—

Special Settlement Laws.

(1) Balasore, Cuttack, and Puri...	Regulation XII of 1805 (applicable to the districts of Cuttack, Puri and Balasore and to Pargana Pataspur in Midnapur. Act X (B. C.) of 1867.
Darjeeling, Jalpaiguri (tract south of Teesta), Manbhum, Hazaribagh, Lohardaga, Palamau, and Singhbhum	Act VIII (B. C.) of 1879.
(3) Jalpaiguri (tract north of Teesta, *i.e.*, Bhutan Duars) ...	Act XVI of 1869. ,, VIII (B. C.) of 1872.

* NOTE.—Chapter X, and ss. 3 to 5, 19 to 39, 41 to 49, 53 to 75, 80, and 189 to 191 of the Bengal Tenancy Act have been extended to Orissa.

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(4) Sonthal Parganas ... Regulation III of 1872.
Chittagong Hill Tracts ... Act XXII of 1860.

The Regulations and Laws cited above for the most part regulate the procedure for the determination of revenue in the districts named opposite them. Acts XXII of 1860 and XVI of 1869, however, merely excluded the jurisdiction of the Civil Courts, and the general spirit of the Rent and Settlement Laws prevailing in the permanently-settled tracts should be followed in making settlements of land revenue in which no Settlement Law is in force.

In fixing rents and determining status, special rent laws are to be followed.

9. Though the Laws and Regulations cited in the preceding rule regulate the powers of Settlement-officers, and the procedure by which they are to carry on settlements in the districts named therein, yet in fixing rents and determining the status of tenants regard must likewise be had to the Rent Laws which prevail in these districts. The Settlement Laws and Regulations cited above determine the procedure by which revenue is to be assessed, and by which the amount of the assets, which are the basis of revenue, is to be ascertained; but it is according to the Rent Laws which prevail in these several districts, supplemented by the provisions of Act VIII B. C. of 1879, where that Act is in force, that the classification of tenants of every degree must be made, and the amount of rents demandable from them must be determined.

Settlements under the Regulations where Tenancy Act is in force.

10. Settlements of the third class may, under special circumstances, be made under the Regulations not repealed by the Tenancy Act in estates or tenures situated in districts in which that Act is in force. This procedure is sufficient to enable a record of existing rents and rights to be prepared, and to provide for the determination of the land revenue demand. It is not, however, possible under this procedure to enhance rents except by registered agreement under s. 29 of the Tenancy Act, nor to make the record-of-right as authoritative as a record-of rights prepared under Chap. X of of the Tenancy Act.

Cases where the procedure of the preceding rule is admissible.

11. The procedure described in the preceding rule may be adopted in the following cases:—

First.—Where the lands are being assessed to rent for the first time as in the case of dearahs, alluvial accretions, and similar instances in which the lands are unoccupied, or in which for any other reason the Government may fix and enforce the payment of any rent it may choose to demand.

Second.—In cases where it is not intended to enhance existing rents, or it is intended to enhance them only in accordance with s. 29 of the Tenancy Act.

The Collector is, in each case, to report for the decision of the controlling authority whether the simpler but less efficacious procedure of the Regulations should be adopted, or whether application should be made for an order under s. 101 of

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the Tenancy Act for a survey and the preparation of a record-of-rights under Chap. X of that Act.

Settlements under the Tenancy Act.

12. Settlements of the fourth class apply in districts in which the Tenancy Act is in force, and it is thought desirable to make under Chap. X of the Act, a record- of-rights and a settlement of fair rents, which shall be judicially binding on the raiyats. The sanction for these settlements is to be found in Regs. VII of 1822, IX of 1825, IX of 1833 as regards the settlement of land revenue with the settlement-holder, and in the Bengal Tenancy Act, as regards the settlement of fair rents.

Modifications introduced by the Bengal Tenancy (Amendment) Act of 1898.—The provisions of the Chapter, as they originally stood in the Act, have been greatly modified by the Bengal Tenancy (Amendment) Act of 1898. The following extract from the Statement of the Objects and Reasons for the Bill, while showing its aims and intention so far as they relate to this Chapter of the Act, explains what the system for recording rights and settling rents was under Chapter X, as originally passed, and what the system now is under the modifications introduced by the Amending Act as regards the settlement of rent where a settlement of land revenue is being or is about to be made—in other words, so far as Part II of this Chapter only is concerned.

"The aims and objects of this Bill", (so far as they relate to Chapter X), "are—(1) to clear up doubts and difficulties of procedure which have arisen in the course of experience in the working of Chapter X of the Bengal Tenancy Act, 1885; (2) to facilitate the settlement of rents when undertaken on a large scale, either for the purpose of settling land revenue or on the application of private individuals.

"As to point (1), the intention of the framers of the Tenancy Act, as explained in Council by Sir Steuart Bayley, when presenting the report of the Select Committee, clearly was *that all disputes affecting the record-of-rights or fixation of rents* were to be formally and finally decided by the Revenue Officer, subject only to appeal to the Special Judge, and to a second appeal to the High Court in certain specified cases. Entries in the record, which were not disputed up to the time of final publication of the record, were to be presumed to be correct till the contrary was proved. If a dispute as to any entry in, or omission from, the record arose, it was to be decided by the Revenue Officer, and his decision was to have the force and effect of a decree. So that every entry in the record as finally published was to have attached to it either (*a*) the presumption of correctness, or (*b*) the force and effect of a decree of a Civil Court. Objections might be made at any time during the publication of the draft record, which the Revenue Officer was to summarily hear and consider, and disputes raised at any time before the final publication of the record were to be heard and decided. The distinction between an objection and a dispute was not, however, clearly defined, and the result has been that the Civil Courts have in some cases held that the Revenue Officer is bound to hear, as civil suits, trifling objections which can be adequately disposed of summarily, to the satisfaction of the parties, without the expense and delay entailed by the formal

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procedure of a civil suit. (1) On the other hand, where Revenue Officers have heard and decided disputes, following the procedure of the Civil Procedure Code, in which cases it was intended that their decisions should, subject to appeal to the Special Judge, be *res judicata*, between the parties, the Civil Courts have in some cases held that their decisions though not appealed against, were not *res judicata*, that no finality attached to them, and that it was open to the parties to re-open the questions decided in the ordinary Civil Courts (2)

"Further, the Courts have held, where a survey is ordered to be made., and a record-of-rights prepared, of a particular estate or local area, that the Revenue Officer has no jurisdiction to hear and decide the dispute, (3) and that when a dispute arises as to whether land claimed rent-free was properly so held or not, the Revenue Officer has no authority to hear and decide the dispute, (4) and again that when a dispute arises as between one landlord and another landlord, or one tenant and another tenant, regarding the ownership or occupation of land, the Revenue Officer has no authority to hear and decide the dispute. (5) It has, in short, been held the Revenue Officer can only hear and decide a dispute between a landlord and tenant, when the relationship of landlord and tenant is proved or admitted to exist.

"The effect of these decisions is to curtail to a very great extent the powers of the Revenue Officer to decide the disputes arising out of his proceedings, to leave gaps in the record-of-rights, and to drive the parties to litigation after the Revenue Officer has left the ground, even as regards matters which he has nominally decided.

"That this was not the intention of the framers of the Act is shown by the following extract from Sir Steuart Bayley's speech in Council, in presenting the Report of the Select Committee on the Tenancy Bill as passed :—

'Under the scheme, therefore, as sketched out in the original Bill, it will be observed (1) that the Revenue Officer, in recording rights, could not decide any dispute which might arise, and consequently his record could be of very little value; (2) that the Settlement Officer, though he could decide whatever disputes came before him, could only deal in a preliminary sort of way with a large class of disputes, which might afterwards be tried out by a regular suit in a Civil Court ; (3) that, though no settlement can in the nature of things be undertaken without the previous preparation of a record-of-rights, the two processes were unconnected in the Bill, and were treated as essentially separate and distinct.

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(1) See note to section 106.

(2) See Pandit Sirdar v. Meajan I. L. R., 21 Cal., 378; Karim Khan v. Brajo Nath Das, I. L. R., 22 Cal., 244; Secretary of State v. Kajimudin, I. L. R., 23 Cal., 257, and contra, Gokhul Sahu v. Jadu Nandan Rai, I. L. R., 17 Cal., 721.

(3) See Narendro Nath Rai v. Srinath Sandel, I. L. R., 19 Cal., 641; Bidhumukhi Debi, v. Bhagwan Chandra Rai, I. L. R., 19 Cal., 643.

(4) See Padmanund Singh v. Bajo, I. L. R., 20 Cal., 577; Secretary of the Stare for India v. Netai Singh, I. L. R., 21 Cal., 38; Korim Khan v. Brojo Nath Das, I. L. R., 22 Cal., 244.

(5) Pandit Sardar v. Meajan, I. L. R., 21 Cal., 378.

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'I need not take you through the successive steps by which the procedure was altered, first in the Bill No. 11 of last year, a description of which will be found in paragraphs 71 to 77 of our preliminary report, and then in the Bill of this year, as explained in paragraph 42 of our final report. It will be sufficient if I explain to you the final result of our discussions as embodied in the Bill now before you. First, then, we have amalgamated the two processes. It was obvious that on a Revenue Officer beginning to record rights he would find himself face to face with numerous cases in which on one side or the other the status of the raiyat, the area of the holding, the amount of the rent payable, were the subject of dispute. Unless he could deal with these disputes his record would be of little value and it was obviously absurd to empower one officer to settle questions of status and area, and then to send in another to settle questions of rent.

"It seemed equally unreasonable to empower a Revenue Officer, with all the parties and witnesses before him, to decide disputes, and to allow the whole matter to be re-opened *de novo* and fought out from the very beginning in a Civil Court. At the same time we wished in no way to diminish the security which parties now have in the decision of their cases by the most competent Courts, and in the right of appeal to the highest Court in the country.

'What we have done, then, has been to give the Revenue Officer, in the first instance, power to settle all disputes that may come before him. Where no dispute arises, he will record what he finds, he will not alter rents, and his entries will only have a presumptive value in cases afterwards brought before the Courts; where a dispute arises, he will decide it on the same grounds by the same rules, and with the same procedure, as a Civil Court. His decision will be liable to appeal, like that of the ordinary Civil Court, to a Special Judge, who may or may not be the Judge of the district, and will be subject to a further special appeal to the High Court. In appeal the High Court may settle a new rent, but in so doing is to be guided by the other rents shown in the rent-roll. In other words, there can be no second appeal to the High Court merely on the ground that the rent has been pitched too high or too low, but if a second appeal is preferred, as may be on the ground that the Special Judge, owing to some error on a point of law has, for example, found the holding to comprise more land or less land than it actually does comprise, or has given the raiyat a wrong status, and if the appellant succeeds, the High Court can, without altering the rate, reduce or increase the rent, as the case may be.

"The decision of the Revenue Officer in disputed cases, subject to these appeals will have the effect of a judgment of the Civil Court, and will be *res judicata*, thus barring a fresh suit for enhancement for 15 years.'

"It is clear that the decisions of the Civil Courts above referred to are not in accord with the intention of the framers of the Act expressed in the preceding extract, and it is thought that if the decisions of Revenue Officers are not, subject to appeal to the Special Judge, to have finality on all questions that come before them, it is desirable to releive them altogether of the duty of deciding disputes as

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civil suits, and to confine them, in the first place, to the preparation of the record of existing facts, rents and status. This record will be prepared, after careful investigation, under such rules as the Local Government may prescribe. It will be published in draft, objections made to any entry in or omissions from it will be carefully considered and disposed of under such rules as may be prescribed by Government; then, it will be finally published and the presumption of correctness will be attached to entries made in it. If the parties afterwards wish to dispute the correctness of any entry or omission, they can do so in the Civil Courts, restrictions on resort to the Courts being imposed only in the case where the entry relates to a rent settled.

"As to the second object mentioned above, section 107 of the Act provides that in all proceedings for the settlement of rent under Chapter X, the Revenue Officer shall, subject to rules made by the Local Government, adopt the procedure laid down in the Code of Civil Procedure for the trial of suits. This implies that each individual case must (subject to modifications made by the Government rules for joinder of tenants holding under the same landlord in the same village) be dealt with separately, a separate record being made, and evidence being separately recorded in each case. When a settlement of rents is being made on a great scale, as is necessary when a settlement of revenue is being made of a large area or in a large private estate, it is apparent that to make the rent of each individual tenant the subject of a separate suit must involve great waste of time and money. If an enhancement or reduction of rent is claimed on the ground of rise or fall of prices since the rents were last fixed, it is obvious that the alteration in prices, if once established for a local area, would affect all tenants in that local area whose rents were last settled at the same time, and it would involve unnecessary waste of time and money to record the evidence over again and allow it to be disputed afresh in each individual case.

"It has always been recognised that Government officers, in settling rents for the purpose of ascertaining the assets on which revenue is to be based in temporarily-settled estates, should have more discretion in the matter of altering rents than was allowable to private individuals in suits in the Civil Courts. The Bengal Government, however, in 1885, with a view to showing that they claimed nothing in the way of enhanced rents in their own estates or in estates under settlement of revenue, which they were not prepared to concede to private landlords, consented to have the same rules and the same procedure applied to their own estates as were proposed for fixation of rent in private estates; but apparently the difference was not sufficiently considered between the difficulties of a settlement of rents on a great scale and a settlement of rent of individual tenants by a Revenue Officer or Civil Court. In individual cases it is easy to follow the procedure of the Civil Procedure Code, but where hundreds of thousands of tenants' rents have to be settled, it is most difficult, if not impossible, to follow the Civil Procedure Code, and to complete the proceeding within a reasonable time at a reasonable expenditure.

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"What is proposed is a procedure which will facilitate settlement of rents on a large scale without unnecessary expense, and without materially altering the substantive provisions of the Act regulating enhancement or reduction of rents."

As has been observed, the above extract applies only to settlements, when a settlement of land revenue is being or is about to be made. The details of the procedure to be adopted in such settlements are more fully explained in the commencement of Part II of this chapter. None of these observations apply to settlements where a settlement of land revenue is not being or is not about to be made, the procedure for which class of settlements is prescribed in Part III of this chapter.

The Bill was on the 26th Feby, 1898, referred to a Select Committee, who presented their report on the 10th March, 1898. It was passed on the 2nd April 1898 and received the assent of the Governor-General on the 3rd May.

Part I.—Record of Rights.

Power to order survey and preparation of record-of-rights.

101. (1) The Local Government may, in any case with the previous sanction of the Governor-General in Council, and may, if it thinks fit, without such sanction in any of the cases next hereinafter mentioned, make an order directing that a survey be made and a record-of-rights be prepared, by a Revenue Officer, in respect of the lands in [any] local area [estate or tenure or part thereof].

(2) The cases in which an order may be made under this section without the previous sanction of the Governor-General in Council are the following, namely :—

(*a*) where the landlords [or tenants] or a large proportion of the landlords or of the tenants apply for such an order and deposit, or give security for, such amount for the payment of expenses, as the Local Government directs ;

(*b*) where the preparation of such a record is calculated to settle or avert a serious dispute existing or likely to arise between the tenants and their landlords generally ;

(*c*) where the local area, estate or tenure or the part thereof belongs to, or is managed by, the Government or the Court of Wards ;

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(*d*) where a settlement of land-revenue is being or is about to be made in respect of the local area, estate or tenure or of the part thereof.

Explanation 1.—The term "settlement of land-revenue," as used in clause (*d*), includes a settlement of rents in an estate or tenure which belongs to the Government.

Explanation 2.—A superior landlord may apply for an order under this section, notwithstanding that his estate or part thereof is temporarily leased to a tenure-holder.

(3). A notification in the official Gazette of an order under this section shall be conclusive evidence that the order has been duly made.

(4). The survey shall be made and the record-of-rights prepared in accordance with rules made in this behalf by the Local Government.

Subsection (2) (*a*): what is a large proportion of landlords or tenants:—The Government of Bengal, in accordance with an opinion given by the Advocate-General, has acted on the assumption that half the landlords is "a large proportion" of them within the meaning of section 101 (2), clause (a). The words "or tenants" were inserted by the amending Act (Bengal Act III of 1898), because there appeared to be no reason why a large proportion of the tenants should not have the same power as a large proportion of the landlords of obtaining a survey and record-of-rights and settlement of rents. It has not been decided what a large proportion of tenants is—whether half or more than half of the entire number, or such a proportion of the tenants as may hold in the aggregate half or more than half the area to be surveyed.

Sub-section (2) (d):—The words "or is about to be made" in clause (d) reproduce the amendment made by section 1 of Bengal Act V of 1894, which was repealed by Bengal Act III of 1898. The object of the amendment is to make it clear that survey and record-of-rights and settlement of rents may be undertaken before the expiration of the period of a current settlement of land-revenue.

Sub-section (2). Explanation 1.—This explanation is borrowed from s. 2. Act V, B. C., of 1894. Its object is to "make clear what was the intention of the present law, namely, that a settlement of rents in estates held direct by Government is included in the term settlement of revenue, and, therefore, that when a record-of-rights of such estates is prepared, a settlement of the rents of all tenants can be made." (Statement of Objects and Reasons, Bill I, para. 23).

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Sub-section (2). Explanation 2.—Para 22 of the Objects and Reasons for the Bill gives the following explanation:—

"Doubts have been raised whether, when a proprietor has leased his estate to a farmer temporarily, he can apply for a survey and record-of-rights or settlement of raiyats' rents. The grounds of these doubts are that section 104 (2) of the Act speaks only of the landlord applying and that the farmer is the raiyat's immediate landlord. It is desirable that a proprietor should not be debarred from obtaining a record-of-rights or settlement of rents merely because he has temporarily sub-let his estate. The explanations make it clear that he is not so debarred."

Sub-section (3):—When an order under section 101 has been issued by notification in the official Gazette, the notification is conclusive evidence that the order has been duly made; and, therefore, if the notification was issued under sub-section (2), it is not open to any person to have the notification cancelled on the ground that any of the conditions enumerated in clauses (a) to (d) of the sub-section have not been fulfilled.

Sub-section (4): Processes of survey and record-of-rights:—The processes ordinarily to be comprised in a survey, record-of-rights and settlement of rents under this Chapter are enumerated in rule 3, Chapter VI of the Government rules under this Act. See Appendix. They are

i.—Demarcation of boundaries and identification of lands.
ii.—Measurement.
iii.—Preparation of the record or *khanapuri*.
iv.—Attestation of the record and determination of status and rents.
v.—Draft publication of the record-of-rights.
vi.—Disposal of objections after draft publication.
vii.—Settlement of fair rents in cases in which a settlement of land-revenue is being or is about to be made.
viii.—Final publication of the record-of-rights.
ix.—Settlement of fair rents in cases in which a settlement of land-revenue is not being made, and the trial of disputes under section 106 of the Tenancy Act.
x.—Apportionment of cost (when the operations have not been carried out in connection with the settlement of the land-revenue), and distribution of certified extracts from records to persons interested.
xi.—Terms of settlement with, and selection of, settlement-holders in settlements of land-revenue.

Costs of survey and record-of-rights:—When the preparation of a record-of-rights is ordered in a case in which a settlement of land-revenue is being or is about to be made, the costs are borne by Government (see section 114, *post*). When a survey and record-of-rights of a local area is ordered with the previous sanction of the Governor-General in Council, under section 101 (1), or by the Local Government under section 101 (2) (b), the costs are advanced by Government in the first instance, and are afterwards recovered, in whole or in part, in such proportions as the

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Local Government may, under section 114, direct. For the instructions of the Board of Revenue relating to deposit and apportionment of costs when the proceedings are carried on under clause (a) or clause (c) of section 101 (2), or under section 103, see the Board's Survey and Settlement Manual, 1900, Part III, Chapter 17.

Particulars to be recorded.

102. Where an order is made under section 101, the particulars to be recorded shall be specified in the order; and may include, either without or in addition to other particulars, some or all of the following, namely:—

(*a*) the name of each tenant [or occupant];

(*b*) the class to which [each tenant] belongs, that is to say, whether he is a tenure-holder, raiyat holding at fixed rates, [settled raiyat], occupancy-raiyat, non-occupancy raiyat or under-raiyat, and, if he is a tenure-holder, whether he is a permanent tenure-holder, or not, and whether his rent is liable to enhancement during the continuance of his tenure;

(*c*) the situation [and] quantity and [one or more of the] boundaries of the land held by [each tenant or occupier].

(*d*) the name of [each tenant's] landlord;

(*e*) the rent payable [at the time the record-of-rights is being prepared];

(*f*) the mode in which that rent has been fixed, whether by contract, by order of a Court; or otherwise.

(*g*) if the rent is a gradually increasing rent, the time at which, and the steps by which, it increases;

(*h*) the special conditions and incidents (if any) of the tenancy.

(*i*) if the land is claimed to be held rent free—whether or not rent is actually paid, and, if not paid, whether or not the occupant is entitled to hold the land without payment of rent and if so entitled under what authority.

Clause (a): Occupant:—The word "occupant" was introduced by the Amending Act (Bengal Act III of 1898) to cover cases of persons holding rent-free lands without authority, who may not be tenants.

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Clause (b) : Classes of tenants :—The enumeration of classes of tenants in this section as it stood originally was defective. The words "settled raiyat" have been inserted The term "occupancy-raiyat," used in the Act, does not cover "settled raiyats." An occupancy-right may be acquired by a new-comer by purchase, while the status of "settled raiyat" is acquired by cultivating any land in the village as raiyat for twelve years, or by inheritance from a raiyat who has done so.—Para 23 of statement of Objects and Reasons of the Amending Bill (1897).

Clause (c) : One or more boundaries.—It is sometimes unnecessary to encumber the record with all four boundaries of each field.

Clause (e) :—The words "at the time the record-of-rights is being prepared" were added to make clear the meaning of the law, as doubts had been raised whether "the rent payable" meant the rent payable in the future or in the past, or at the time the record is being prepared. The expression "rent payable" in other clauses of the Act means the existing rent, and not the rent that may be payable in future.

Clause (h) : Special conditions and incidents :—Under the former Chapter X, it was held that a settlement-officer was not justified in recording the existence of a right of way which one tenant had upon the land of another :—Horo Mohon *v.* Pran Nath, 4, C. W. N., 127; it was further held that a Settlement-officer had no jurisdiction to decide civil disputes arising between landlord and tenant :—*Ibid.* See also Pundit Sardar v. Meajan Mirdha, I. L. R., 21 Cal., 378.

Clause (i) :—Clause (*i*) was added to make it clear that the Revenue-officer has authority to ascertain and record whether land is held rent-free or not, and whether the occupant is entitled to hold it rent-free. Revenue-officers had this authority under the old law of settlement. Under the former chapter it was held that in preparing a record-of-rights under s. 102, a Revenue officer was not competent to determine the validity of rent-free titles set up by persons occupying lands within the area under enquiry, so as to resume such lands and to declare them liable to settlement of rent.—The Secretary of State for India v. Nitaye Singh, I. L. R., 21 Cal., 38. But where the defendant claimed under a *sannad* granted by a predecessor of the then zemindar, and of a date subsequent to the decennial settlement and was therefore regarded as a tenant within the meaning of the Bengal Tenancy Act, *held* that the Revenue-officer had jurisdiction to enter the particulars of the land in his record-of-rights.—Gokul Sahu v. Jadunandan, I. L. R., 17 Cal., 721. The defendant in a case set up a *sannad* from a person, who was not apparently a predecessor of the plaintiff and it was of a date anterior to the decennial settlement; the Revenue-officer was of opinion that no rent had ever been paid for the land and the land was *mal* and not *lakhiraj*, *held* that the Revenue-officer had no jurisdiction to make this determination.—Karmi Khan v. Brojo Nath, I.L.R. 22 Cal. 244. In proceedings under Chapter X of the former Act it was held that a Settlement-officer had no jurisdiction to resume and assess with rent land which had been held as lakhiraj.—Padmanand v. Brojo, I. L. R., 20 Cal., 577.

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Remedies against settlement proceedings:—When the particular referred to this clause is followed by an entry in, or an omis sion from, a settlement rent-roll, which is only prepared in the course of a settlement in which a settlement of land revenue is being, or is about to be made, any one aggrieved by such entry or omission may, before the final publication of the settlement rent roll,

(1) raise an "objection" before the Revenue Officer (sec. 104 E), and

(2) appeal against his decision to the Superior Revenue authority prescribed by Government to hear such appeals (sec. 104 G).

When the settlement rent-roll has been incorporated with the record-of-rights, and the latter has been finally published, any person aggrieved by an entry in, or an omission from it, may also

(3) institute a suit in the Civil Court under section 104 H (a) or (b), or

(4) institute a declaratory suit under sec. 111 A.

When the particular referred to in this clause is recorded in the course of a settlement in which a settlement of land revenue is not being, or is not about to be made, then either the landlord or the occupant of the land concerning which the particular is recorded may within two months of the final publication of the record of rights,

(1) apply for a settlement of a fair and equitable rent for the land (sec. 105),

(2) appeal against the Revenue Officer's settlement of the rent to the Special Judge, [sec. 109 A (2)],

(3) institute a suit before the Revenue-Officer in respect of any matter other than the settlement of the rent (section 106),

(4) appeal against his decision to the Special Judge [sec. 109 A (2)], and

(5) present a second appeal against the Special Judge's decision to the High Court [sec. 109 A (3)].

Power for Revenue Officer to record particulars on application of proprietor or tenure-holder [or large proportion of raiyats.]

103. On the application of [one or more of the] proprietors or tenure-holders, (or of a large proportion of the raiyats, of an estate or tenure,) and on (the applicant or applicants) depositing or giving security for the required amount for expenses, a Revenue Officer may, subject to and in accordance with rules made in this behalf by the Local Government, ascertain and record all or any of the particulars specified in section 102 with respect to the estate or tenure or any part thereof.

Old section:—Proceedings under the old section 103 were held by the High Court to be suits, and rents were settled in proceedings under it."—Acha Mian v. Durga Chandra I. L. R., 25 Cal., 146. In Dharani Kanta v. Goharali, 7 C.W. N., 33 it was held that when an application was made by a proprietor or tenant of an estate or tenure, under section 103 of the Bengal Tenancy Act before its amendment by Bengal Act III of 1898, for the preparation of a record-of-rights, the Revenue-officer was competent to make a survey and measurement of the lands, and that

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the procedure to be adopted by him was to be the same as in the case of a proceeding under section 101, and that where in such proceeding there was a denial of the relation of landlord and tenant, either by the landlord or the tenant, it was absolutely necessary for the Revenue-officer to deal with the question in order to enable him to make the necessary entries under section 102; but that the decision of the Revenue-officer did not operate as *res judicata* in a subsequent suit by the landlord for declaration of his title to eject the tenant and for mesne profits.

The new section:—The particulars specified in s. 102 of this Act when recorded and compiled under s. 103, amount to a "Record-of-rights" as contemplated in chapter X of the Act; and proceedings taken by a Revenue Officer, after making a record of the particulars under section 103, including those under section 105 of the Act are not therefore void for want of jurisdiction. Dharani Kanta Lahiri v. Goher Ali Khan I.L. R, 30 Cal., 339. relied on. Per Pargiter J.—The difference between section 103 of the old Act and the present section is, that, under the former, the Revenue officer was to record the particulars specified in section 102; but under the present Act section 103 gives an applicant the right to select what particular he may wish to have recorded. If the applicant asks that all or almost all the particulars mentioned in section 102 be recorded, the record would constitute a "Record of rights"; but if only the particulars mentioned in clauses (a) and (c) of section 102 be recorded, they not involving any rights, the record could hardly be called a "Record of rights."—Sudhendu Narain Acharjya Chowdhry v. Gobinda Nath Sircar. I. L. R., 32 Cal., 518. s, c. 9 C. W. N. 504. It was not intended by the alterations made in section 103 by the amending Act to change the previous substantive law and procedure under the old Chapter regarding the decision of disputes and settlement of rents under section 103, the intention being to enable an auction-purchaser of a fractional share against whom the other co-sharers and the tenants may have combined, to obtain a survey and record-of-rights. During the preparation of a record-of-rights of an estate under section 103 of the Bengal Tenancy Act by a Settlement-officer, the landlord put in a petition under section 104, sub-section (2), of the old Chapter X, for the settlement of the rent of a certain tenant's holding. The tenant, notwithstanding the fact that notice was served upon him, did not adduce any evidence, and the Settlement-officer decided that the tenant was an occupancy raiyat, and fixed a fair and equitable rent for the holding. Against this decision of the Settlement-officer no appeal was preferred to the Special Judge. Subsequently a suit was brought in the Civil Court by the tenant to have the class to whice he belonged and the nature of his holding, *i.e.*, whether the rent was enhanceable or not, determined. The defence of the landlord was that, having regard to the decision of the Settlement-officer, the question could not be re-opened. It was held that, under the provisions of section 104, sub-section (2), and section 107, of the old Chapter X, the decision of the Settlement-officer amounted to a decree, and that the matters determined by the decision could only be re-opened on an appeal to the Special Judge. As no appeal was preferred, the decision became final, and questions decided in that suit could not be re-opened in the new suit.—Durga

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Charan v. Hatien Mundle, I. L. R., 29 Cal., 252. In this case the proceedings were instituted under section 103 after the amendment of Chapter X, the power of a Revenue-officer to make a record-of-rights and to settle rents in proceedings under section 103 was not questioned, and it was ruled that the questions decided by the Revenue-officer could not be reopened in a suit in the Civil Court.—*Ibid.*

One or more proprietors:—The words "one or more" were inserted in this section by the amending Act III of 1898. Under the old section *all* the proprietors were bound to apply. There is no reason "why an obstructive co-sharer should have power to preent other co-sharers from obtaining a survey and record-of-right if they wish to do so."—(Statement of Objects and Reasons, para. 24).

Preliminary publication, amendment and final publication of record-of-rights.

103A. (1) When a draft record-of-rights has been (prepared), the Revenue Officer shall publish the draft in the prescribed manner and for the prescribed period, and shall receive and consider any objections which may be made to any entry therein, or to any omission therefrom, during the period of publication.

(2) [When such objections have been considered and disposed of according to such rules as the Local Government may prescribe, and (if a settlement of land-revenue is being or is about to be made) the Settlement Rent Roll has been incorporated with the record under section 104F, sub-section (3)], the Revenue-officer shall finally frame the record, and shall cause it to be finally published in the prescribed manner; and the publication shall be conclusive evidence that the record has been duly made under this Chapter.

(3) Separate draft or final record may be published under sub-section (1) or sub-section (2) for different local areas, estates, tenures or parts thereof.

This section reproduces section 105 of the old Chapter X, with addtions and modifications.

The manner and period for publication of draft and final records are prescribed in Rules 20 and 35 of Chapter VI in Appendix.

Sub-section (3):—Sub-section (3) was enacted by the amending Act (Bengal Act III of 1898) because doubts had been raised whether, when a local area had been notified for survey and record-of-rights it was not necessary that the record of the whole area notified should be published together and at the same time. This sub-section makes it clear that it is not necessary to publish the record for the entire area at the same time.

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Presumption as to correctess of record-of-rights.

103B. A certificate, signed by the Revenue officer, stating that a record-of rights has been finally published under this Chapter, shall be conclusive evidence of such publication; and every entry in a record-of-rights so published shall be presumed to be correct until the contray is proved.

The latter part of this section reproduces section 109, sub section (2) of the old Chapter X.

Part II.—Settlement of rents, preparation of Settlement Rent Roll, and decision of disputes in cases where a settlement of land-revenue is being or is about to be made.

Difference between part I and part II :—Part I of this Chapter applies to all surveys made and records-of-rights prepared under the Chapter, whether a settlement of land-revenue is or is not being made or about to be made, of the area under survey. This Part [11] describes the procedure, methods and principles to be followed in settling rents, preparing Settlement Rent Rolls, and disposing of disputes, where a settlement of land-revenue *is* being made or is about to be made, all of which have been differentiated from the methods and procedure to be followed where a settlement of land-revenue *is not* being made or about to be made.

Procedure for settlement of rents in Government and temporarily-settled estates :—The procedure now to be followed under Part II of this Chapter and the reasons for modifying the former provisions are given in the following extracts from Statement of Objects and Reasons to amend the Tenancy Act (para 12 and 13):

"An important change is proposed in procedure, namely, to transfer the control and supervision of Revenue Officers, when preparing the record-of-rights and fixing the amount of the rents, to the Revenue authorities in the first instance. This is subject, however, to the provisos that entries relating to possession, status, title, etc., in the record-of-rights may be called in question in the Civil Courts, as they are to have only presumptive correctness, and that entries of rent settled, in the Settlement Rent Roll, may be also called in question in the Courts on certain specified grounds noted. If the Civil Court finds that any such entry is incorrect, it shall itself specify what correction is to be made, and shall not refer the matter back to the Revenue Officer. The Bill, therefore, enlarges, rather than curtails, the powers of the Civil Courts. Questions of status, title, etc., which under the Act were intended to be finally decided by the Revenue Officer, subject to appeal to the Special Judge, are now to be explicitly left for final decision to the Civil Courts. As to questions of rent settled, there was under the Act an appeal from the Revenue Officer to the High Court. The Bill transfers the right of appeal on these questions, in the first instance, from the Revenue Officer to the confirming Revenue authorities, but even as regards rents settled does not altogether exclude resort to Civil Courts, for it gives them jurisdiction, which they had not under the Act, in a large class of cases.

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"On the question of settling rents, the Select Committee reporting on the Tenancy Bill, as passed, said—

"The questions whether a rent is open to settlement, and, if so, the amount at which it should be settled, are of a complex nature depending on two very different sets of considerations. They depend, in the first place, on issues relating to such matters as the existence of the tenancy, the extent of the land, the status of the tenant, the conditions under which he holds, etc., and possibly involving points of law which could not satisfactorily be decided without the security afforded by an ultimate appeal to the highest judicial authority. They depend, in the second place, on considerations of an economical nature, such as the state of prices prevailing at different periods, the effect of improvements, and so forth, which it is universally admitted cannot be adequately dealt with, either in the first instance or on appeal, except after local enquiry and by persons possessed of special technical knowledge. The problem before us has been how best to provide for the separation of these two elements, so that each may be dealt with, and finally dealt with, by those most competent to deal with it.'

" If for the reasons given above it is desirable to withdraw the judicial procedure and appeal to the Special judge so far as proceedings before the Revenue Officers for the decision of disputes are concerned, it is manifestly more so in the matter of settling rents which as the Select Committee remarked, 'it is universally admitted cannot be adequately dealt with either in the first instance or on appeal except after local enquiry by persons possessed of special technical knowledge.' The Revenue authorities are the best judges of economic facts, as the Select Committee held, and all that is now proposed is to restore to them their proper jurisdiction, while reserving all questions of right and title for the Courts. Provision is at the same time made for giving to the settlements of rents and decisions of disputes hitherto made by Revenue Officers under the law as it stands, that finality which, subject to appeal to the Special Judge, it was intended by the framers of the Act that they should have.

The Hon'ble Mr. Finucane in introducing into Council the Bill to amend the Bengal Tenancy Act made the following observations on the subject :

" The principal changes in procedure proposed in Chapter X of the Tenancy Act are these two:—(1) Under the Act revenue officers were intended and empowered to decide all disputes that came before them at any time up to the final publication of the records, in the same way, and following with slight modifications the same procedure, as the civil courts, whether such disputes related to possession, right, title, status or any other question that might arise from an entry made or proposed to be made, or an omission from, the record. Their decisions were to have the force and effect of decrees of the civil courts, and were to be subject to appeal only to a Special Judge appointed by Government for the purpose, and from him to the High Court; but it was not intended that the correctness of their orders on any dispute so decided should be liable to be questioned in the ordinary Munsifs' Courts. Now, it is proposed that revenue officers shall not finally decide any questions of the kind, nor

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are their orders to have the force and effect of decrees of the civil courts. When a dispute is raised on any of the classes of questions just mentioned, Revenue officers will endeavour to ascertain to the best of their ability the true state of things, and after hearing what the parties concerned have to say,[1] they will pass a summary order directing that entry to be made in the record which appears to be the proper one. These entries will be presumed to be correct, but any one who is dissatisfied with them can contest their correctness in the ordinary Civil Courts having jurisdiction to entertain a suit for recovery of rent of the land which forms the subject-matter of the dispute.

"I will explain later on why this change is proposed. Here I merely note the fact.

"(2) The second great change proposed in the procedure prescribed in Chapter X is in the method and agency for the determination of fair-rents. Under the present law, Revenue Officers are bound to settle rents, as in the case of decision of disputes, on the same principles, in the same way, and following the same procedure as the Civil Courts; their final orders or decisions fixing fair rents are appealable to the Special Judge, but no second appeal, as regards the question whether the rent is pitched too high or too low, lies to the High Court against an order of a Revenue Officer fixing a fair rent.

"Under the Bill it is proposed that the orders of Revenue Officers fixing fair rents shall not be appealable to the Special Judge, but to the superior Revenue authorities and that the finding of the Revenue authorities as to what the amount of the fair rent is, shall be final, except in certain specified classes of cases, in which it is left open to the parties to contest in the Civil Court the orders of the Revenue authorities even as to the amount of a fair rent settled, but only on certain specified grounds.

"If I have succeeded in making these two points clear, it will be manifest in the first place that the Bill not only does not curtail the powers of the ordinary Civil Courts, but, on the contrary, that it actually enlarges the powers of these Courts, that it transfers to them from the Revenue Officers the decision of all disputes involving questions of possession, status, right, and title, and allows an appeal to the High Court on every point on which an appeal now lies to the Court, and that all it does is to alter the procedure for settlement of rent and to transfer the right of appeal on questions of fixing rents from the Special Judge to the Revenue authorities. It is true it allows no resort to the ordinary Munsiff's Courts or to the High Court as to the amount of a rent settled, except on certain specified grounds, but neither does the present law.

"I now proceed to state reasons why the first of the changes mentioned above, namely, the transference of the decision of disputes to the Civil Courts, is proposed. The framers of the Act of 1885 thought that on a Revenue officer beginning a record of rights, he would find himself face to face with numerous cases in which, on the one side or the other, the status of the raiyat, the area of the holding, the amount of the rent payable, were the subject of dispute. Unless he could deal with these

(1) This now applies only to "objections" under sec. 103A.

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disputes, the record would, they thought, be of little value, and it was in their opinion obviously absurd to empower one officer to settle the question of status and area, and then to send another to settle the question of rent. It appeared to them equally unreasonable to empower a Revenue officer, with all the parties and witnesses before him, to decide disputes and then to allow the whole matter to be re-opened from the very beginning in a Civil Court.

"The natural result of such a course must, it was supposed, be to leave behind the Revenue officer a crop of litigation for the Civil Courts to deal with after the Revenue officer had left. Hence the Select Committe on the Tenancy Bill empowered the Revenue officers to decide all disputes that might arise out of their own proceedings instead of leaving them over for the decision of the Civil Courts.

"It will be asked, why it is now proposed to depart from the conclusion then come to in this respect? The answer is—*firstly*, that the officers themselves have, in recent years, declared that the burden of deciding questions of possession, status, right and title following the procedure of the Civil Procedure Code, is too heavy for them and have begged to be relieved of it: and *secondly*, that the High Court have declared that the class of officers employed on survey and settlement proceedings are unfit for the work of deciding questions of status, right and title.

"In one of their judgments (1) the Hon'ble Judges of the High Court expressed the opinion that the Legislature could not have intended to transfer civil suits as to rights in land between tenant and tenant to the Revenue Officer, and in another (2) they declared that they did not think that the Legislature contemplated the formidable result that officers, such as those entrusted with the duty of preparing records of right, should be permitted to enquire into disputes as to the titles to land of indefinite extent.

"It will be shown presently that the intention of the Legislature in reality was that Revenue officers should enquire into and decide all disputes coming before them. But however that may be, the proposals now made in this respect are in accordance with the views of the Hon'ble Judges as enunciated in the decisions to which I have referred, and as they are also in accordance with the wishes of the Revenue officers concerned, it is hoped that they will meet with general approval.

"The sole objection to this part of the Government proposals is in this, that, as the authors of the Tenancy Act feared, the Revenue officers will leave after them disputes which they have raised but not finally settled, and as their disputes will, if the parties wish to have them decided at all, have to be decided by the Civil Courts, the suitors, especially those of the poorer classes, may find the cost of litigation in the Civil Courts much higher and the results not more satisfactory than the decisions of the Revenue officers have been. This is no doubt a serious risk; but the difficulties put in the way of Revenue officers by the decisions of the superior Civil Courts are so great that some change in the law is considered clearly necessary, and no more satisfactory solution of the problem has in the opinion of Government been suggested than that now proposed in the Bill.

(1) Pandit Sirdar v. Meajan, I. L. R., 21 Calc., 378.

(2) Bidhu Mukhi Debi v. Bhagwan Chandra Rai, I. L. R., 19 Calc., 643.

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"For these reasons then it is proposed that Revenue Officers shall be relieved altogether of the duty of deciding disputes. They will in preparing records of right confine themselves to ascertaining and recording, to the best of their ability, existing facts of possession and status. Presumptive evidential value of correctness will be given to the entries made by them in their records, and it will be open to the parties concerned to question the correctness of these entries in the Civil Courts.

"I now come to the reasons for the second important change proposed, namely that in the procedure, method and agency for settling rents. The method of settling rents prescribed in the Tenancy Act is briefly this—the existing rents are presumed to be fair, and any one who wants to alter them has to show, by legal evidence, the grounds of the proposed alteration. The present Act provides that in all proceedings of settlement of rents under Chapter X the Revenue Officer shall, subject to rules made by the Local Government, adopt the procedure laid down in the Code of Civil Procedure for the trial of suits, and their orders fixing fair rents are appealable to the Special Judge. This implies that each individual case must, (subject to joinder of tenants holding under the same landlord in the same village), be dealt with separately, a separate record being separately recorded in each individual case Now, when settlements of revenue are being made on a large scale, as they are in Orissa. and Chittagong, and rents have consequently to be settled for all the tenants of an entire Division containing hundreds of thousands of holdings, it must be manifestly impossible to treat the settlement of rent in the case of each individual tenant judicially and as a separate civil suit, if the proceedings are to be completed within the reasonable limit of time and at a reasonable expenditure of money. Moreover it is not necessary for the ends of justice to treat each individual tenant's case separately. When, for example, a rise or fall in the prices since the rents were last fixed has been established to the satisfaction of the tenant or the Revenue Officer, and an alteration in the rents generally is sought on the ground of rise or fall in prices since the rents were last fixed it would obviously involve great waste of time and money to record the evidence on the point of alteration in prices over and over in each separate case. The same remark applies to a prevailing rent. If a prevailing rate is once established for a village or local area, it should not be necessary to record all the evidence in support of it over and over again in each individual tenant's case. But it is necessary to do this if the judicial procedure is to be followed in the settlement of rents. To meet these and other difficulties, it is now proposed to dispense with the judicial procedure altogether in the settlement of fair rents by Revenue officers, and to substitute more elastic methods of settling rents under the supervision and control of the Superior Revenue authorities, whose findings will be liable to be contested in the Civil Courts on certain specified grounds and on those grounds only.

"Nobody who has not travelled through Bengal, Bihar and Orissa, and studied on the ground the existing land-tenures, can fully comprehend the immense variety and complication of rent systems that prevail in these Provinces.

"In Chittagong, on the one side, small plots of permanently-settled and

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temporarily-settled lands measuring a half an acre or less—plots of what are known as long-term and short-term *taluks, itmams, dar-itmams,* and various other tenures of the kind, not to speak of plots embraced in ordinary occupancy and non-occupancy raiyats' holdings—are all interspersed like squares on a chessboard in the same village. The same person is often proprietor, and having created a tenure under himself in favour of another person, then becomes an occupancy tenant under the tenure-holding of his own creation in land of which he is also proprietor.

"In Backerganj there are no less than 13 different grades of intermediate tenure-holders between the proprietor and the actual cultivator, and the same person often holds shares as proprietor and again as tenure-holder under another tenure-holder and as occupancy raiyat under yet another, all in the same plot of land. To give a concrete example. In a particular estate in that district one Kamiruddin has a small plot of land. He holds a fractional share, represented by $\frac{7}{1}\frac{0}{8}\frac{8}{8}\frac{1}{8}$ of that plot as an occupancy raiyat under a *howladar*, a share, represented by $\frac{1}{8}\frac{1}{0}\frac{7}{1}\frac{5}{8}$, under another *howladar* as tenant at fixed rates, $\frac{1}{8}\frac{0}{0}\frac{5}{1}\frac{5}{8}$ as occupancy raiyat under the same *howladar*, and $\frac{1}{1}\frac{1}{8}\frac{4}{8}\frac{7}{8}$ as under-raiyat.

"Again, in Chota Nagpur, in another direction, rent is assessed not by an acreage rate, but by guesswork according to the number of ploughs the tenant may have or the quantity of seed sown by him. In Bihar, in another direction, the system of tenures is comparatively simple and is analogous to that prevailing in the neighbouring districts of the North-Western Provinces; but even there proprietary interests are extremely complicated, and a proprietor has been known to hold the one millionth part of an estate, the Government revenue of the whole estate being one anna.

"How is it possible for the Judicial Officer sitting in a Court with no experience of these things to understand these complications of tenures or to fairly assess the rents that they ought to pay?

"But even if an officer sitting in Court could understand the intricacies of tenures still the assessment of fair rents on a large scale under the procrustean rules of judicial procedure would be extremely difficult.

"As Sir John Shore wrote more than 100 years ago: 'The infinite varieties of soil and further variations of value from local circumstances are absolutely beyond the investigation and almost the comprehension not merely of a Collector, but of any body who has not made it the business of his life.

"Sir Charles Elliott wrote 80 years later, when he was Settlement Officer in the Central Provinces: 'The art of fixing rent is an almost lost one. If you ask any *semindar* why such a field pays such a rent, the most intelligent of them can give you no answer but that his fathers fixed it so.'

"Now, such being the complications of tenures and such being the difficulties in the way of settling rents, on a great scale, it is considered by Government that the best agency for overcoming these difficulties is that of Revenue Officers, who can go on the ground, see the land for themselves, observe and ascertain

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the facts on the land, and consult the people concerned in their villages. It is thought that the hard-and-fast rules of the law of evidence and of the Civil Procedure Code are not suited to proceedings of this kind. It follows that it is not desirable to tie Revenue Officers down by the Civil Procedure Code or prescribe any one method of settling rents, and to insist that Revenue Officers shall follow that method only.

"A good Settlement Officer who is tactful and sympathetic will make a good settlement without any law. He will consult the people concerned, be guided largely by what they think, and generally carry them with him. He will recognise the facts that the people who have lived on the land all their lives know very much more than he can of its capabilities, that the present rent is the result of the past history of the holding and of the haggling of all the ages, and he will not, if he is wise, ignore that history or attempt to raise or lower all rents to one dead level according to his own preconceived notions of the fitness of things. The landlords and raiyats are generally reasonable when brought together in thier villages, surrounded by their neighbours and restrained by the public opinion of their fellows. Hence, it is deemed to be a matter of cardinal importance that officers settling rents should be free to consult the people in their villages, to note what they say, and themselves to observe facts on the spot and make use of the knowledge thus acquired in coming to a conclusion as to what a fair rent would be. But this the law of evidence and the Civil Procedure Code do not allow them to do.

"Again, an inexperienced Revenue Officer may, under the present law, do great mischief either by excessive enhancements or reductions of rent. The superior Revenue authorities have no real control over him under the law as it stands, and his decisions, however manifestly wrong can only be reversed by a regular appeal to the Special Judge, which appeal can only be made within 30 days of the passing of his order, and when made may take a very long time to decide. Moreover, as I have already indicated, if each and every landlord and tenant in a vast estate or local area under settlement of rents were to contest the Revenue Officer's orders or proposals for settling fair rents, and to fight out every case as a civil suit, as they are entitled to do under the present law, it is clear that the proceedings would be interminable, and the expense intolerable. Happily the raiyats and landlords have not fought out every case. They have generally accepted reasonable proposals; but, admitting this to be the rule, there have been exceptions where the tenants kept aloof and rents were settled behind their backs, which were manifestly unfair. These rents were not appealed against to the Special Judge within the period of limitation. They became binding on the parties, and the Revenue authorities had no legal power to alter them. The law ought not to be based on the assumption that recourse to it will not be generally needed, and that people will always be moderate and reasonable.

"For all these reasons it is proposed to transfer the control of Revenue Officers in settling rents to the Revenue authorities, who are not to be tied down by the

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rules of judicial procedure, and it is also proposed to make the method of settling rents more elastic than it now is." (Proceedings of the Bengal Council, 3rd April, 1897, pp. 147-156).

Settlement of rents, and preparation of Settlement Rent Roll, when to be undertaken by Revenue Officer.

104. In every case in which a settlement of land-revenue is being or is about to be made, the Revenue Officer shall, after publication of the draft of the record-of-rights under section 103 A, subsection (1),—

(*a*) settle fair and equitable rents for tenants of every class.

(*b*) notwithstanding any thing contained in section 192, settle a fair and equitable rent for any land in respect of which he has recorded, in pursuance of clause (*i*) of section 102, that the occupant is not entitled to hold it without payment of rent, and,

(*c*) prepare a Settlement Rent Roll.

Former section:—"In any case under section 101, sub-section (2), clause (*d*), the officer shall settle a fair and equitable rent in respect of the land held by the tenant."

In settling rents under this section, the officer shall presume, until the contrary is proved, that the existing rent is fair and equitable, and shall have regard to the rules laid down in this Act for the guidance of the Civil Court in increasing or reducing rents, as the case may be." It was held under the old section that the only provision of law under which a Settlement-officer could make a settlement of rent in respect of excess land, was s. 104, and that did not apply to lands held by one who was not a tenant in respect of other lands to which they had become attached:—Padmanand *v.* Bajo, I. L. R., 20 Cal., 577.

Clause (b):—Section 192 referred to in clause (b) of the section gives power to a Revenue officer when land revenue is being for the first time assessed on, or a fresh settlement of land revenue is being made of, a temporarily settled area, on the application of either the landlord or the tenant, to set aside leases to hold land rent-free or at a particular rent and to assess rent upon the land, but requires him to fix a fair and equitable rent in accordance with the provisions of this Act. Under the present clause he is bound to settle a fair rent, whether the landlord or tenant applies for such settlement or not, in case he has recorded under clause (i) of s. 102 that the occupant is not entitled to hold the land without payment of rent.

The Revenue Officer is bound under this section to settle fair and equitable rent for all classes of tenants, therefore of under-raiyats who are, under s. 3 (3) *ante*, tenants.

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Procedure for settlement of rents and preparation of Settlement Rent Roll under this part.

104A. (1) For the purpose of settling rents and preparing a Settlement Rent Roll, the Revenue Officer may proceed in any one or more of the following ways, or partly in one of these ways and partly in another, that is to say,—

(*a*) if in any case the landlord and tenant agree between themselves as to the amount of the rent fairly and equitably payable, the Revenue Officer shall satisfy himself that the rent so agreed upon is fair and equitable and if he is so satisfied, but not otherwise, it may be settled and recorded as the fair and equitable rent;

(*b*) the Revenue Officer may himself propose what he deems to be the fair and equitable rent and if the amount so proposed is accepted, either orally or in writing by the tenant, and if the landlord, after notice to attend, raises no objection, the rent so proposed may be settled and recorded as the fair and equitable rent;

(*c*) if the circumstances are, in the opinion of the Revenue-Officer, such as to make it practicable to prepare a Table of Rates showing for any local area, estate, tenure or village or part thereof, the rate or rates of rent fairly and equitably payable by tenure-holders and raiyats and under-raiyats of each class, he may frame a Table of Rates and settle and record rents or any of them on the basis of such rates in the manner hereinafter described;

(*d*) the Revenue Officer may settle all or any of the rents by maintaining the existing rentals recorded in the record-of-rights as published under section 103A, sub-section (1), or by enhancing or reducing such rentals: Provided that in making any such settlement regard shall be had to the principles laid down in sections 6 to 9 (both inclusive), 27 to 36 (both inclusive), 38, 39, 43, 50 to 52 (both inclusive), 180 and 191.

(2) The Settlement Rent Roll shall show the name of each landlord and of each tenant whose rent has been settled, and the amount of each such tenant's rent payable for the area shown against his name.

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The provisions of this and of the following sections of Part II of this chapter were introduced by the amending Act of 1898. The methods prescribed in clauses (*a*), (*b*) and (*d*) are in accord with the principles laid down in the old Chapter X, but that prescribed in clause (*c*) is new :

The reasons for introducing this section are thus given :

"The endless variety of local conditions in a vast Province like Bengal, containing, as it does, in one place or another, every form of land-tenure known in India, from the primitive system of Chota Nagpur and Angul, analogous to that of the Central Provinces, on one side, to the Bihar system, analogous to that of the North Western Provinces, in another, to the highly complex and intricate system prevailing in Chittagong and Backergunge in a third direction, and to the raiyatwari system prevailing in Government estates, analogous to the Madras and Bombay systems, in other directions, is so great, that no one system of settling rents will work well in all parts of the province alike.

"Hence, it is thought desirable to make the method of settling rents more elastic than it is at present, and this has been provided for in the new section 104A inserted in the Bill. That section enables the Revenue Officer to settle rents by compromise, with the assent of the parties, when satisfied that the rents agreed upon are fair and equitable, or to propose rents which, if accepted, may be settled as fair, or to frame a Table of Rates where the conditions are such as to render this practicable, and to apply the rates to areas resulting from survey, or to maintain the existing rents, or to enhance or reduce them on the grounds specified in the Tenancy Act.

"The system of framing Tables of Rates was abandoned when the Tenancy Act was being passed, because it was thought to be generally impracticable: but it was admitted at the time that there were some areas in which it was practicable to frame Tables of Rates. It is believed that this is the case in parts of Orissa, to which province the Tenancy Act was not extended when passed. The provisions of the Bill for framing Tables of Rates follow to a large extent the proposals of the Rent Commission and those of the Bill of 1884."—(Statement of Objects and Reasons appended to the Bill to amend the Tenancy Act, paras, 9, 10 and 11).

Clause (a):—See section 35 *ante*.

Clause (d):—When the parties have not agreed between themselves as to the amount of fair rents, or the Revenue-Officer does not accept the amount agreed upon as fair under clause (*a*), or the parties do not accept the rents proposed by the Revenue-Officer under clause (*b*), or when the circumstances are such that a Table of Rates cannot, in the opinion of the Revenue-officer, be prepared under clause (*c*), then the Revenue-officer has to settle fair rents under clause (*d*), that is to say, he is to presume that the existing rent is fair, and is to enhance or reduce it, as the case may be, having regard to the principles laid down in this Act for the guidance of the Civil Courts in enhancing or reducing rent.

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Contents of Table of Rates.

104B. (1) If a Table of Rates is prepared, it shall specify—

(*a*) the class or several classes of land for which, having regard to the nature of the soil, situation, means of irrigation, and other like considerations, it is in the opinion of the Revenue Officer necessary or practicable to fix a rate or different rates of rent; and

(*b*) the rate or rates of rent fairly and equitably payable by tenants holding land of each such class whose rent is liable to alteration.

Local publication of Table.

(2) When the Revenue Officer has prepared the Table of Rates he shall publish it in the local area, estate, tenure or village to which it relates, in the vernacular language prevailing in the district, and in the prescribed manner.

Revenue Officer to deal with objections.

(3) Any person objecting to any entry in the Table of Rates may present a petition to the Revenue Officer within a period of one month after such publication, and the Revenue Officer shall consider any such objection and may alter or amend the Table.

Table to be submitted to superior Revenue authority.

(4) If no objection is made within the said period of one month, or, where objections are made, after they have been disposed of, the Revenue Officer shall submit his proceedings to the Revenue authority empowered by rule made by the Local Government to confirm the Tables and Rent Rolls prepared under this Part (hereinafter called the "confirming authority") with a full statement of the grounds of his proposals, and shall forward any petitions of objection which he may have received.

Proceedings of confirming authority.

(5) The confirming authority may confirm a Table submitted under sub-section (4) or may disallow the same, or may amend the same in any manner which appears to it proper, and may allow in whole or in part any objection forwarded therewith or subsequently made, or may return the case for further enquiry.

Effect of Table.

(6) When a Table of Rates has been confirmed by the confirming authority, the order confirming it shall be conclusive evidence that the proceedings for the pre-

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paration of the Table have been duly conducted in accordance with this Act; and it may be presumed that the rates shown in the Table for tenants of each class, for each class of land, are the fair and equitable rates for land of that class within the area to which the Table applies.

Application of Table of Rates.

104C. When a Table of Rates has been confirmed under section 104B, sub-section (5), the Revenue Officer may settle all or any of the rents and prepare the Settlement Rent Roll on the basis of the rates shown in the Table, by calculating the rental of each tenure or each holding of a raiyat or under-raiyat on the area of such tenure or holding at the said rates:

Provided that the Revenue Officer shall not be bound to apply the said rates in any particular case in which he may consider it unfair or inequitable to do so.

Rules and principles to be followed in framing Table of Rates and settling rents in accordance therewith.

104D. In framing a Table of Rates under section 104B, and in settling rents under section 104C, the Revenue Officer shall be guided by such rules as the Local Government may make in this behalf, and shall so far as may be, and subject to the proviso to the said section 104C, have regard to the general principles of this Act regulating the enhancement or reduction of rents.

Preliminary publication and amendment of Settlement Rent Roll.

104E. (1) When a Settlement Rent Roll for a local area, estate, tenure, or village or part thereof has been prepared, the Revenue Officer shall cause a draft of it to be published in the prescribed manner and for the prescribed period, and shall receive and consider any objections made to any entry therein, or omission therefrom, during the period of publication, and shall dispose of such objections according to such rules as the Local Government may prescribe.

(2) The Revenue Officer may, of his own motion or on the application of any party aggrieved, at any time before Settlement Rent Roll is submitted to the confirming authority under section 104F, revise any rent entered therein:

Provided that no such entry shall be revised until reasonable notice has been given to the parties concerned to appear and be heard in the matter.

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Final revision of Settlement Rent Roll, and incorporation of the same in the record-of-rights.

104F. (1) When all objections have been disposed of under section 104E, the Revenue Officer shall submit the Settlement Rent Roll to the confirming authority, with a full statement of the grounds of his proposals and a summary of the objections (if any) which he has received.

(2) The confirming authority may sanction the Settlement Rent Roll, with or without amendment, or may return it for revision:

Provided that no entry shall be amended, or omission supplied, until reasonable notice has been given to the parties concerned to appear and be heard in the matter.

(3) After sanction by the confirming authority the Revenue Officer shall finally frame the Settlement Rent Roll, and shall incorporate it with the record-of-rights published in draft under section 103A.

Appeal to, and revision by, superior Revenue authorities.

104G. (1) An appeal, if presented within two months from the date of the order appealed against, shall lie from every order passed by a Revenue Officer prior to the final publication of the record-of-rights on any objection made under section 104B, sub-section (3) or section 104E; and such appeal shall lie to such superior Revenue authority as the Local Government may by rule prescribe.

(2) The Board of Revenue may, in any case under this Part, on application or of its own motion direct the revision of any record-of-rights or any portion of a record-of-rights, at any time within two years from the date of the certificate of final publication, but not so as to affect any order passed by a Civil Court under section 104H:

Provided that no such direction shall be made until reasonable notice has been given to the parties concerned to appear and be heard in the matter.

Limitation of jurisdiction of Civil Court in matters relating to rent.

104H. (1) Any person aggrieved by an entry of a rent settled in a Settlement Rent Roll prepared under sections 104A to 104F and incorporated in a record-of-rights finally published under section 103A, or by an omission to settle a

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rent for entry in such Settlement Rent Roll, may institute a suit in the Civil Court which would have jurisdiction to entertain a suit for the possession of the land to which the entry relates or in respect of which the omission was made.

(2) Such suit must be instituted within six months from the date of the certificate of final publication of the record-of-rights, or if, an appeal has been presented to a Revenue authority under section 104G, then, within six months from the date of the disposal of such appeal.

(3) Such suit may be instituted on any of the following grounds, and on no others, namely:

(*a*) that the land is not liable to the payment of rent;

(*b*) that the land, although entered in the record-of-rights as being held rent-free, is liable to the payment of rent;

(*c*) that the relation of landlord and tenant does not exist;

(*d*) that land has been wrongly recorded as part of a particular estate or tenancy, or wrongly omitted from the lands of an estate or tenancy;

(*e*) that the tenant belongs to a class different from that to which he is shown in the record-of-rights as belonging;

(*f*) that the Revenue Officer has not postponed the operation of the settled rent under the provisions of section 110, clause (*a*) or has wrongly fixed the date from which it is to take effect under that clause;

(*g*) that the special conditions and incidents of the tenancy have not been recorded or have been wrongly recorded.

The Secretary of State for India in Council shall not be made a defendant in any such suit unless the Government is landlord or tenant of the land to which the aforesaid entry relates or in respect of which the aforesaid omission was made.

(4) If it appears to the Court that the entry of rent settled

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is incorrect, it shall, in case (*a*) or case (*c*) mentioned in sub-section (3), declare that no rent is payable, and shall in any other case settle a fair rent; and in any case referred to in clause (*f*) or clause (*g*) of the said sub-section (3), the Court may declare the date from which the rent settled is to take effect or pass such order relating to the entry as it may think fit.

(5) When the Court has declared under sub-section (4) that no rent is payable, the entry to the contrary effect in the record-of-rights shall be deemed to be cancelled.

(6) In settling a fair rent under sub-section (4), the Court shall be guided by the rents of the other tenures or holdings of the same class comprised in the same Settlement Rent Roll, as settled under sections 104A to 104F.

(7) Any rent settled by the Court under sub-section (4) shall be deemed to have been duly settled in place of the rent entered in the Settlement Rent Roll.

(8) Save as provided in this section, no suit shall be brought in any Civil Court in respect of the settlement of any rent or the omission to settle any rent under section 104A to 104F.

(9) When a Civil Court has passed final orders or a decree under this section it shall notify the same to the Collector of the district.

Sub-section (6):—See notes under s. 106 *post*.

Sub-section (8):—Any one dissatisfied with an entry in, or an omission from, a record of rights prepared under this Part of the Chapter, which concerns a right of which he is in possession, may sue for a declaration of his right under the provisions of the Specific Relief Act (1 of 1877), Sec. 111 A.

Presumptions as to rents settled under sections 104A to 104G.

104J. Subject to the provisions of 104H, all rents settled under sections 104A to 104F, and entered in a record-of-rights finally published under section 103A, or settled under section 104G, shall be deemed to have been correctly settled and to be fair and equitable rents within the meaning of this Act.

Government rules:—For the procedure under Part II of this chapter, see rules 22 to 34 of Chap. VI of the Government rules, Appendix.

Appeals under Part II:—An appeal lies to the superior Revenue-authorities from every order passed by the Revenue-officer under section 104B (3) on objections to anentry

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in a Table of Rates, and from orders passed by a Revenue-officer on an objection to an entry in, or omission from, the Settlement Rent Roll. When the record is finally published, all entries in it are presumed to be correct till the contrary is shown. The parties can thus obtain a summary decision from the Revenue-authorities on any objections they may have to any entry or omission from the record-of-rights.

Suits in Civil Courts under Part II:—If they wish to carry further any matter regarding which they are aggrieved, they must sue in the Civil Court. If they feel aggrieved regarding a rent settled, the suit must be instituted within six months of the date of certificate of the final publication of the record-of-rights, or, if an appeal has been presented to a Revenue-authority regarding the amount of rent shown in the Settlement Rent Roll as settled, or regarding an omission to settle rent for entry in the Settlement Rent Roll, they must sue within six months of the date of disposal of such appeal. A suit can only be instituted on some of the grounds specified in section 104H (3).

Proceedings final:—An entry of rent settled, or an omission to settle rent for entry in a Settlement Rent Roll, becomes final if not appealed against within the prescribed period of six months, while other entries are only presumed to be correct, and the presumption may be rebutted by suit at any time after the final publication of the record-of-rights. (See section 111A, *post*).

Part III.—Settlement of Rents and decision of disputes in cases where a settlement of land-revenue is not being or is not about to be made.

Settlement of rents by Revenue officer in case where a settlement of land-revenue is not being or is not about to be made.

105. (1) When, [in any case in which a settlement of land-revenue is not being made or is not about to be made], either the landlord or the tenant applies [within two months from the date of the certificate of the final publication of the record-of-rights under section 103A, sub-section (2)], for a settlement of rent, the Revenue Officer shall settle a fair and equitable rent in respect of the land held by the tenant.

Explanation.—A superior landlord may apply for a settlement of rent notwithstanding that his estate or tenure or part thereof has been temporarily leased.

(2) When, in any case in which a settlement of land-revenue is not being made or is not about to be made, the Revenue Officer has recorded, in pursuance of clause (*i*) of section 102, that the occupant of any land claimed to be held rent-free is not entitled to hold it without payment of rent, and either the landlord or the occupant applies, within two months from the date of the certificate of the final publication of the record-of-rights under section 103A, sub-section (2)

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for a settlement of rent, the Revenue Officer shall settle a fair and equitable rent for the land.

(3) Every application under sub-section (1) or sub-section (2) shall, notwithstanding anything contained in the Court-fees Act, 1870, bear such stamp as the Government of India may from time to time prescribe by notification in the Gazette of India.] VII of 1870.

(4) In settling rents under this section, the Revenue officer shall presume, until the contrary is proved, that the existing rent is fair and equitable, and shall have regard to the rules laid down in this Act for the guidance of the Civil Court in increasing or reducing rents, as the case may be.

[(5) The Revenue Officer may in any case under this section propose to the parties such rents as he considers fair and equitable; and the rents so proposed, if accepted orally or in writing by the parties, may be recorded as the fair rents, and shall be deemed to have been duly settled under this Act.

(6) Where the parties agree among themselves, by compromise or otherwise, as to the amount of the fair rent, the Revenue Officer shall satisfy himself that the amount agreed upon is fair and equitable, and, if so satisfied, but not otherwise, he shall record the amount so agreed upon as the fair and equitable rent. If not so satisfied, he shall himself settle a fair and equitable rent as provided in sub-sections (4) and (5).]

Old section:—"(1) When in any proceeding under this chapter it does not appear that the tenant is holding land in excess of, or less than, that for which he is paying rent, and neither the landlord nor the tenant applies for a settlement of rent, the officer shall record the rent payable by the tenant, and the land in respect of which the rent is payable.

(2) When it appears that a tenant is holding land in excess of, or less than, that for which he is paying rent, or either the landlord or the tenant applies for a settlement of rent, or in any case under section 101, sub-section (2), clause (*d*), the officer shall settle a fair and equitable rent in respect of the land held by the tenant." [s. 104. (1) and (2)]

In the case of Gauri Patro *v.* Reily, (I. L. R., 20 Cal., 579), and of Secretary of State *v.* Kajimudin, I. L. R., 23 Calc., 257, it was held that a settlement officer has no power to settle rents *suo motu* under sec. 104 (2), when it does not appear on the face of his proceedings that the lands held by the tenants are in excess of that for which they were paying rent, and when in such circumstances he had settled rents,

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his proceedings were held to be of an executive and not of a judicial character. But in a later stage of the same case (I. L. R., 26 Cal., 617) it was said that, given the circumstance of an increase or a decrease in the area of the land for which a tenant is paying rent, it is competent to the Revenue Officer under sec. 104 (2) to settle a fair and equitable rent in respect of the whole of the land of the tenant, including the excess area, and the Revenue Officer can in such a case enhance the rent under the provisions of the Act, *e.g.*, on the ground of the rise in prices of the food crops, and so forth.

The present section modifies these views as explained in the Objects and Reasons for the Bill (para 25) :—

"The Revenue Officer will not be bound, as at present, of his own motion, to settle a fair rent, when it appears that the tenant is holding land in excess of or less than that for which he is paying rent. It has been ruled by the High Court that it must so appear on legal evidence, and therefore the provision of the present law requiring the Revenue Officer to settle rent in private estates of his own motion, when it appears to him that the tenant is holding more or less land than he is paying rent for, is inoperative, unless application is made and evidence produced."

Sub-section (2):—While the entry made by a Revenue Officer in the record of rights with regard to land claimed to be rent-free under sec. 102 (*i*) is only a summary one, the entry of the rent settled made under this section is final, subject to the provisions of secs. 108 and 109A, and sec. 107. See note to sec. 102. In Upadhya Thakur *v.* Persidh Singh, (I. L. R., 23 Cal , 723) it has been ruled that proceedings under sec. 104 (2) of the old Chap. X for the settlement of rents are not suits. The same view will obtain under the altered provisions. They are instituted by an application, and the provisions of the Court Fees Act, 1870, applicable to suits, do not apply to them. Not being suits, the provisions of sec. 373, Civ. Pro. Code are not applicable to them.—Janardan Misra *v.* Barclay, 5 C. W. N., cxl.

Sub-sections (5) and (6).—These sub-sections correspond to sub-sections (*b*) and (*a*) of section 104A. As to settling fair rents by compromise, the High Court remarked in one case as follows :—

"It is the duty of a Revenue-officer to inquire from each of these tenants in turn, first , whether he had agreed to the petition (*i.e.*, the compromise) purporting to come from him. If he denied this, as the plaintiff offered no other evidence, there would be an end of his case as against that tenant ; but, if the tenant admitted having made the particular petition, the Settlement-officer should then ascertain what he understood that he consented to. Some of the petitions at least are vague in regard to the foundation upon which, by comparison with the new measurement by the Collector, the excess area is to be determined. This should form the subject of a careful inquiry, and each of the tenants should be asked what he understood and

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admitted to be the representation of the area of his previous holding. Upon these data the Settlement-officer will be in a position to determine on the said measurement whether such a tenant is liable to additional rent on excess lands within the terms of the petition."

The above remarks were made before the amendment of the Tenancy Act by Bengal Act III of 1898. In the amended Act the law has been strengthened, and it has been made quite clear, that, in the case of compromises purporting to be agreements to alter the existing rent on any of the other grounds mentioned in the Act, as well as on the ground of excess area, the Revenue-officer must satisfy himself as to the fairness and equity of the rent settled by him. In all cases in which compromises are put forward, the Revenue-officer shall after such inquiry as may be necessary to test the fairness of the rents agreed upon, record an order stating definitely whether he is or is not satisfied that the rents proposed are fair and equitable, and giving his reasons. If he is so satisfied, he should settle the rents agreed upon by the parties; if he is not, he should settle a fair rent under sub-sections (4) and (5).—Mohurana Sheorttun *v.* Shib Govinda, unreported appeal 2209 dated the 10th Sept., 1895.

Rules:—For rules for the settlement of fair rents on the application of the parties under this section, see Appendix, rules 36 to 41 of the revised Chap. VI of the Government rules under the Tenancy Act. Rule 39 allows any number of tenants occupying land under the same landlord in the same village to make a joint application for the settlement of rents, or to be joined as defendants in the same proceeding on a similar application by the landlord. This is founded on rule 25 of the old rules under the former chapter, which was alluded to in Upadhya Thakur *v.* Persidh Singh (I. L. R., 23 Cal., 729) as not being *ultra vires*.

Decision of disputes by Revenue Officer.

106. If, in any case under this Part, a dispute arises at any time within two months from date of the certificate of the final publication of the record-of-rights under section 103A, sub-section (2), regarding any entry which the Revenue Officer has made in, or any omission made from, the record,

whether such dispute be between landlord and tenant, or between landlords of the same or of neighbouring estates, or between tenant and tenant, or as to whether the relationship of landlord and tenant exists, or as to whether land held rent-free is properly so held, or as to any other matter,

a suit may be instituted before the Revenue Officer, by presenting a plaint on stamped paper, for the decision of the dispute, and the Revenue Officer shall then hear and decide the dispute:

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Provided that the Revenue Officer may, subject to such rules as the Local Government may prescribe in this behalf, transfer any particular case or class of cases to a competent Civil Court for trial.

Old section:—This section was substituted by Bengal Act, 1 of 1903 for the section 106 which was enacted by Bengal Act III of 1898, s. 7. Section 106 of the old Chap X ran as follows:—

"If at any time before the final publication of the record under the last foregoing section a dispute arises as to the correctness of any entry (not being an entry of a rent settled under this chapter), or as to the propriety of any omission which the Revenue-officer proposes to make or has made therein or there from, the Revenue-officer shall hear and decide the dispute."

Distinction between "objections" and "disputes."—The distinction between "objections" under sec. 105 and "disputes" under sec. 106 of the former Act was pointed out in the cases of Gopi Nath Masant *v.* Adoito Naik, I. L. R., 21 Cal., 776; Aannd Lal Paria *v.* Shib Chandra Mukhusji, I. L. R., 22 Cal., 477; and Secretary of State *v.* Kajimudin, I. L. R., 23 Cal., 257; and it was ruled that an "objection" could be made during the pendency of the publication of the draft record of rights, but a "dispute" could be raised only after the preparation of the draft record and before its final publication. A contrary view was held in Durga Charan Loskar *v.* Hari Charan Das, I. L. R., 21 Cal. 521, which necessitated a reference to the Full Bench in Dengu Kazi *v.* Nobin Kissori Chaudhurani, (I. L. R., 24 Cal., 462; 1 C. W. N., 294), and it was decided that a "dispute" can arise at any time, *i.e.*, both before and after the publication of the draft record, and even before an entry in the record is made, and that the decision of a dispute so arising is a decision under sec. 106 of the former Chapter X of the Act, and therefore, subject to appeal, and second appeal. "Objections" are now clearly distinguished from "disputes." "Objections" may by made under section 103A after publication of the draft record and *before* the final publication of the record. They are heard and considerd and summarily disposed of. "Disputes" can only be raised *after* final publication of the record, and are heard and decided as civil suits. The former are of two kinds, *viz.*, (1) objections to entries in, or omissions from, the record of rights, which may be preferred and are to be disposed of before the final publication of the record (sec. 103A): and (2) objections to the settlement rent-roll (104E). Such objections can only be preferred during the period of publication.

Object of the amendment:—It has been held that when a dispute arose as to whether certain lands formed part of an estate or local area notified for survey and record-of-rights, the Revenue-officer had no jurisdiction to hear and decide the dispute, but should omit the land in dispute from the record altogether—Norendro Nath Roy Chowdhry *v.* Srinath Sandel [1891], I. L. R., 19 Cal., 641; Bidhumuki Debi *v.* Bhugwan Chunder Rai [1891], I. L. R., 19 Cal., 643; also that, when two tenants disputed as to which of them should be recorded as tenant of particular

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lands, the Revenue-officer had no jurisdiction to decide the dispute.—Pundit Sardar *v.* Meajan Mirdha, I. L. R., 21 Cal., 378. It has also been held that when a dispute arose as to whether land claimed rent-free was properly held rent-free or not, it was doubted whether the Revenue-officer had any jurisdiction to decide the dispute.—Secretary of State for India *v.* Nitye Sing [1893], I. L. R., 21 Cal., 38; Karim Khan *v.* Brojo Nath Das [1894], I. L. R., 22Cal., 244. So also when there is a dispute as to a right of way between two neighbouring tenants.—Haro Mohan *v.* Ramnath, I. L. R., 27 Cal., 364; 4 C. W. N., 127. The present section is intended to make it quite clear that the Revenue officer has jurisdiction in these matters. In Gokhul Shaha *v.* Jadunandan, I. L.R., 17 Cal., 721, the defendant having admitted their tenancy, it was held that the Revenue officer had jurisdiction to decide whether the land held by them was rent paying or rent free. This was followed in Jaipul *v.* Palakdhari, 2 C. W. N., 491.

Proceedings under this section.—Proceedings for decision of disputes under this section are suits. This confirms the decision in Petu Ghorai v. Ram Khelwan, I. L. R. 18 Cal., 667 and over-rules Upadhya Thakur v. Persidh Singh, I. L. R. 23 Cal., 729.

Res judicata in Settlement cases.—It has been ruled that, when a Revenue-officer disposes of an objection summarily under section 103A of the amended Chapter (section 105 of the old Chapter) without adopting the procedure laid down in the Code of Civil Procedure for the trial of suits, his order has not the effect of *res judicata*, and is not open to appeal to the Special Judge or to second appeal to the High Court.—Kurban Ali *v.* Jafur Ali, I. L. R., 28 Cal., 471. A decision by a Revenue-officer (under the old section 107) as to which of two persons claiming to be the tenant ought to be recorded as such, did not operate as *res judicata* in a subsequent civil suit between the same parties concerning the title to the land.—Pundit Sardar *v.* Miajan I. L. R, 21 Cal., 398. But an order disposing of a "dispute" heard and decided under section 106 under the procedure laid down in the Code of Civil Procedure for the trial of suits has the effect of a decree in a suit between the parties, is *res judicata*, and subject to appeal to the Special Judge and to second appeal is final.—(Gokhul Sahu *v.* JaduNandan Rai, I. L. R., 17 Cal., 721; Jaipal Dhobi *v.* Palakdhari Das, 2 C. W. N., 491). And this rule applies where the status of a tenant or his fair and equitable rent has been determined.—Durga Charan Laha *v.* Hatem Mandal, 5 C. W. N., clv; Ram Autar Sigh *v.* Sanoman, I. L. R., 27 Cal., 167. An order made by a Revenue Officer, determining the rent payable for a holding has the force of a decree, and when not set aside by appeal or otherwise, cannot be questioned in a Civil Court. —Ram Autar Singh *v.* Sanoman Singh, I. L. R., 27 Cal., 167. But an order of a settlement officer disposing of an objection under sec. 105 of the former Chapter X has not the effect of *resjudicata*, estopping the trial of the same matters in the Civil Court.—Secretary of State *v.* Kajimudin, I. L. R., 23 Cal., 257. Where the plaintiff had initiated proceedings under sec. 106 against the landlord and certain persons who claimed to be tenants of the land to have their (*i.e.*, the plaintiffs' names) recorded as tenants in the settlement proceedings, it was held by the Settlement

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Officer that they were the tenants. The persons claiming to be rival tenants, appealed to the Special Judge, but the landlord did not appeal. The Special Judge reversed the Settlement Officer's decision; the plaintiffs then sued in the Civil Court for a declaratory decree of their rights as tenants. It was ruled that the Special Judge's decision did not operate as *res judicata*, as it merely decided the question as between tenant and tenant.—(Jaggannath Ramanuj Das *v.* Chandra Kumar Basu, 5 C. W. N., 421).—It has been held that an order of a Special Judge as to the length of the standard of measurement to be used in measuring lands is not a decision under section 106, and that no second appeal lies from it to the High Court.—Narohari *v.* Hari Churun I. L. R., 26 Cal., 556.

107. In all proceedings for the settlement of rents under this Part, and in all proceedings under section 106, the Revenue Officer shall, subject to rules made by the Local Government under this Act, adopt the procedure for the trial of suits; and his decision in every such proceeding shall have the force [and effect of a decree of a Civil Court in a suit between the parties, and, subject to the provisions of sections 108 and 109A, shall be final.

Procedure to be adopted by Revenue Officer.

XIV of 1882.

(2) A note of all rents settled and of all decisions of disputes by the Revenue Officer under section 105 or section 106 shall be made by him in the record-of-rights finally published under section 103A, sub-section (2), and such note shall be considered as part of the record.]

Commission:—"Under section 392 of Act XIV of 1882, the Civil Procedure Code, and section 107 of the Bengal Tenany Act, VIII of 1885, the Lieutenant Governor is pleased to make the following rule as to the persons to whom commissions shall be issued by Revenue Officers empowered under Chapter X of the Bengal Tenancy Act:—

"Whenever under the provisions of section 107 of the Bengal Tenancy Act, VIII of 1885, and Chapter XXV of the Civil Procedure Code, Act XIV of 1882, Revenue Officer directs that a local enquiry be held in the course of proceedings for the settlement of rents, the commission shall be issued to such person not below the rank of a Sub-Deputy Collector or Revenue Officer invested with powers under Chapter X of Bengal Tenancy Act as the officer directing the enquiry shall appoint for this purpose."—(Government notification No. 5073 L. R., dated Nov. 28th 1895, published in the *Calcutta Gazette* of December 4th, 1895, Part 1. p. 1146).

Force of a decree:—"S. 107 does indeed provide that a decision in a proceeding under s. 106 "shall have the force of a decree," but it does not necessarily follow

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that it shall in all cases operate as *res-judicata*, for an ordinary decree of a Civil Court has not that effect except on certain conditions, which are set forth in s. 13 C. P. C.—"(*Per* PRINSEP, HILL and STEVENS, JJ.). Dharani Kant *v.* Gohar Ali, 7 C. W. N. 33 at p.54. A decision in a proceeding under the second clause of sec. 104 of the former chapter of the Bengal Tenancy Act, in consequence of an application made by a landlord for the settlement of rent was held to have the effect of a decree and the matters decided by such a decision could only be re-opened on an appeal to the Special Judge.—Durga Churn Law v. Basir Mundal 6 C. W. N., 238. Where in a settlement proceeding the rent of a tenant was settled in the tenant's absence who did not appear, and the landlord whose estate was under the Court of Wards obtained a certificate for the realisation of the arrears, *held* that in a suit brought by the tenant for the cancellation of the certificate and determination of the plaintiff's juma the decision of the settlement officer although admissible in evidence as to the tenant's rent, did not make the question of the rent *res judicata*:—Asutosh *v.* Abdool, I. L. R., 28 Cal. 676. See notes under s. 106 *ante*.

Appeal: "—Under s. 107 the decisions of the Settlement-officer in all proceedings under the chapter are to have force of a decree, and under s. 108, cl. 2, an appeal lies to the Special Judge from all decisions of the Settlement officer. But it is only in cases under s. 106 decided by the Special Judge that a second appeal lies to this Court," (High Court) "and such cases can only relate to disputes regarding the correctness of entries other than entries of rent settled."—(*Per* Trevelyan and Rampini JJ.). Gopi Nath v. Adoita Naik, I. L R., 21 Cal., 776 at p. 781.

Enhancement of rent:—Where an objection to certain entries with regard to enhancement of rent under s. 105 (2) was disallowed, it was held under the old chapter that the proceedings of the Settlement-officer were of an executive rather than of a judicial character and did not operate either as *res judicata* or as a final decree under s. 107 estopping the plaintiffs from having the same matters tried by the regular Civil Court :—The Secretary of State *v.* Kajimuddy, 23W. R., 257. When a number of tenants occupied land under the same landlord and were joined as defendants in the same proceeding for the settlement of rent under s. 104, cl. 2 of the former chapter and an appeal was preferrd to the Special Judge under s. 108, cl. 2 from the Revenue-officer's decision, *held* that as many court-fees of Rs. 10 each as there were tenant defendants were payable — Upandhaya Thakur *v.* Persidhi Singh (F. B.), I. L. R., 23 Cal., 723. The decison in the case of Shewbarat *v.* Nirpat, 16 Cal., 596, was dissented from and the decision in the case of Petu Ghorai *v.* Ram Khelwan, 18 Cal., 667, was overruled by the Full Bench case of Upadhay Thakur, 23 Cal.. 723.

Court-fee on memo. of appeal.

Government Rules:—The rules relating to procedure, made by the Local Government under this section, are Rules 36 to 42, in Chapter VI.—Appendix.

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Revision by Revenue officer.

108. Any Revenue-officer especially empowered by the Local Government in this behalf may, on application or of his own motion, within twelve months from the making of any order or decision under section 105, section 106 or section 107, revise the same, whether it was made by himself or by any other Revenue officer, but not so as to affect any order passed or decree made under section 109A:

Provided that no such order or decision shall be so revised if an appeal from it is pending under section 109A or until reasonable notice has been given to the parties concerned to appear and to be heard in the matter.

Bar to jurisdiction of Civil Courts.

109. Subject to the provisions of section 109A, a Civil Court shall not entertain any application or suit concerning any matter which is or has already been the subject of an application made or suit instituted under section 105, section 107, or section 108.

Appeals from decision of Revenue-officers.

109A. (1) The Local Government shall appoint one or more persons to be a Special Judge or Special Judges for the purpose of hearing appeals from the decisions of Revenue-officers under sections 105 to 108 (both inclusive).

(2) An appeal shall lie to the Special Judge from the decisions of a Revenue-officer under sections 105 to 108 (both inclusive); and the provisions of the Code of Civil Procedure relating to appeals shall, as nearly as may be, apply to all such appeals.

(3) Subject to the provisions of Chapter XLII of the Code of Civil Procedure, an appeal shall lie to the High Court from the decision of a Special Judge in any case under this section (not being a decision settling a rent) as if he were a Court subordinate to the High Court within the meaning of the first section of that Chapter:

Provided that if in a second appeal the High Court alters the decision of the Special Judge in respect of any of the particulars with reference to which the rent of any tenure or holding has been settled, the Court may settle a new rent for the tenure or holding, but in so doing shall be guided by

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the rents of the other tenures or holding of the same class comprised in the same record as ascertained under section 102 or settled under section 105 or section 108.

This section reproduces section 108 of the old Chapter X, with some modifications.

Sub-sectoin (3): Second appeals:—Under the former Chapter X no second appeal lay against nor could the High Court interfere under sec. 622 of the Civil Procedure Code with, the order of a Special Judge in regard to the settlement of rents.—Shewbarat Koer *v.* Nirpat Rai, I. L. R., 16 Cal., 596; Kirat Narain *v.* Palakdhari Pandey, I. L. R., 17 Cal., 326; Achha Mian *v.* Durga Charan Laha, I. L. R., 25 Cal., 146; 2 C. W. N., 137. No second appeal relating to such a matter will lie under the present section. It was also held under the former Chap. X, that no second appeal lay from an order of a Special Judge dismissing an appeal on the ground that there was no appeal to him in a case of a boundary dispute which had been tried and decided by a settlement officer acting as a Survey officer under Part V of the Bengal Survey Act, V, B. C., of 1875.—Irshad Ali Chaudhri *v.* Kanta Prasad Hazari, I. L. R., 21 Cal., 935. But a second appeal lies from the decision of a Special Judge on questions with regard to the prevailing standard of measurement, area of lands in the possession of tenants and the liabilty of tenants to pay rent on account of any excess land.—Mathura Mohan Lahiri *v.* Uma Sundari Debi, I. L. R., 25 Cal., 34. The rule laid down in this case cannot apply when there has been no measurement, when the Settlement officer has done nothing but settled the length of the measure to be used in measuring the lands of the village, and when the order of the Special Judge is only to the effect that no appeal lay to him from this order of the Settlement Officer.—Narahari Jana *v.* Hari Charan Paramanik, I. L. R., 26 Cal., 556. In DenguKazi *v.* Nobin Kissori Chaudhrani (I. L. R., 24 Cal., 462; 1 C. W. N., 294) it has been laid down that, whenever under the former chap. X "a dispute arises whether before or after the publication of the draft record, as to the correctness of an entry which the Revenue officer proposes to make or has made in the record that he is preparing, his decision of such a dispute is a decision in a proceeding under sec. 106, and a second appeal from the decision of the Special Judge in appeal from such a decision lies to the High Court under sec. 108 (3).

Court-fee:—Proceedings in a case of settlement of rents did not constitute a suit, and that the Court-fee duty was only 8 ans. under art. 1, clause (*b*), para. 2, Sched. II of the Court-Fees Act (VII of 1870).—Upadhya Thakur *v.* Persidh Singh, I. L. R., 23 Cal., 723, overruling the decision of Petu Gherai *v* Ram Khelwan Lal, I. L. R., 18 Cal., 667.

High Court's powers of revision:—In Upadhya Thakur *v.* Persidh Sigh, I. L. R., 23 Cal., 723, it was held that the Court of a Special judge is a Court subordinate to the High Court and that, therefore, the High Court has power to interfere under sec. 15 of the Court's Charter with his orders in cases in which no second appeal lies.

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Part IV.—Supplemental Provisions.

Date from which settled rent takes effect.

110. When a rent is settled by a Revenue Officer under this Chapter, it shall take effect from the beginning of the agricultural year next after the date of the decision fixing the rent or (if a settlement of land-revenue is being or is about to be made) the date of final publication of the Settlement Rent Roll:

Provided as follows :—

(*a*) if the land is comprised in an area, estate or tenure in respect of which a settlement of land-revenue is being or is about to be made, the rent settled shall, subject to the provisions of sections 191 and 192, take effect from the expiration of the period of the current settlement, or from such other date after the expiration of that period as may be fixed by the Revenue Officer:

(*b*) if the land is not comprised in an area, estate or tenure as aforesaid, and if the existing rent has been fixed by a contract binding between the parties for an unexpired term of years, the rent settled shall take effect from the expiration of that term, or from such other date after the expiration of that term as may be fixed by the Revenue Officer.

This section reproduces the old section 110 with additions and modifications. The additions were explained in para. 26 of the Statement of the Objects and Reasons thus :—

The justice and expediency of those provisoes [*i. e.*, provisoes (*a*) and (*b*)] will be manifest. When a general settlement of rents is being made in a private estate, if the existing rent of particular tenants was settled by contract legally binding on the parties, the term of which has to run for a few years, there is no reason why a fair rent should not be settled for such tenants, while the Revenue officer is on the spot, on the application of the parties, to take effect from the expiration of the term, or from a later date fixed by the Revenue-officer.

The same remark applies to settlement of rents for purposes of settlement of revenue. The existing rents having been ordinarily fixed for the period of settlement of revenue, there is no reason why they should be altered during the currency of that period.

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Stay of proceedings in Civil Court during preparation of record-of-rights.

111. When an order has been made under section 101, directing the preparation of a record-of-rights, then, subject to the provisions of section 104H, a Civil Court shall not,—

(*a*) where a settlement of land-revenue is being or is about to be made—until after the final publication of the record-of-rights, and

(*b*) where a settlement of land-revenue is not being made or is not about to be made—until three months after the final publication of the record-of-rights,

entertain any suit or application for the alteration of the rent or the determination of the status of any tenant in the area to which the record-of-rights applies.

What is barred by section 111 is the entertainment by a Civil Court of any suit or application for the determination of the status of a tenant (or alteration of the rent), in the area to which the record of rights applies, until three months after the final publication of the record of rights.—Troilokya Nath Bose *v.* M. N. Meherd, I. L R., 28 Cal., 34. The jurisdiction of the Civil Court is not ousted in cases of other classes than those referred to in this section ; so that when a tenant has agreed to pay additional rent at a stipulated rate for excess land found on measurement to be in his possession, a suit for arrears at this rate is not barred under the provisions of this section ; for such a suit is not a suit for alteration of the rent but one for arrears of rent, and it does not become a suit for alteration of rent merely because subsequently to the accrual of the arrears there have been settlement proceedings, and land measured in connection therewith.—(Ramzan Ali *v.* Amzad Ali, I. L. R., 20 Cal., 903).

Limitation of jurisdiction of Civil Courts in matters, other than rent relating to record of rights.

111A. No suit shall be brought in any Civil Court in respect of any order directing the preparation of a record-of-rights under this chapter, or in respect of the framing, publication, signing or attestation of such a record or of any part of it, or, save as provided in section 104H, for the alteration of any entry in such a record of a rent settled under sections 104A to 104F :—

Provided that any person who is dissatisfied with any entry in, or omission from, a record-of-rights framed in pursuance of an order made under section 101, sub-section (2), clause (*d*), which concerns a right of which he is in possession, may institute a suit for declaration of this right under Chapter VI of the Specific Relief Act, 1877.

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112. (1) The Local Government, with the previous sanction of the Governor-General in Council, may, on being satisfied that the exercise of the powers hereinafter mentioned is necessary in the interests of public order or of the local welfare, invest a Revenue-officer acting under this Chapter with the following powers or either of them, namely:—

Power to authorise special settlement in special cases.

(*a*) power to settle all rents;

(*b*) power, when settling rents, to reduce rents if, in the opinion of the officer, the maintenance of existing rents would on any ground, whether specified in this Act or not, be unfair or inequitable.

(2) The powers given under this section may be made exerciseable within a specified area either generally or with reference to specified cases or classes of cases.

(3) When the Local Government takes any action under this section, the settlement-record prepared by the Revenue-officer shall not take effect until it has been finally confirmed by the Governor-General in Council.

This section reproduces, without alteration, section 112 of the old Chapter X, which was intended to take the place of the Agrarian Disputes Act (Bengal Act. VI. of 1876). Sir Steuart Bayley, when moving for the consideration of the Reports of the Select Committee on the Bengal Tenancey Bill, observed :—

"It is an extreme power, intended to take the place of Sir R. Temple's Agrarian Outrage Act, and I trust it will be resorted to as little as that Act was; but it seems desirable that, in the exceptional cases in which it may be necessary to have recourse to this procedure, the Government should have the power of going to the root of the disputes, and should be able to put the whole relations of landlord and tenant on a stable footing for a reasonable period."

113. (1) When the rent of a tenure or holding is settled under this Chapter, it shall not, except on the ground of a landlord's improvement or of a subsequent alteration in the area of the tenure or holding, be enhanced, in the case of a tenure or an occupancy-holding or the holding of an under-raiyat having occupancy-rights, for fifteen years, and, in the case of a non-occupancy holding or the holding of an under-raiyat not having occupancy-rights, for five years; and no such rent shall be reduced within the periods aforesaid save on the ground of alteration in the area of the holding or on the ground specified in section 38, clause (*a*).

Period for which rents as settled are to remain unaltered.

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(2) The said periods of fifteen years and five years shall be counted from the date on which the rent settled takes effect under this Chapter.

Object of the section:—"Section 113 of the Act provides that a rent settled shall not be enhanced in the case of an occupancy-raiyat for 15 years, and of a non-occupancy-raiyat for five years, but there is nothing to prevent its being reduced within these periods respectively. The intention was to fix rents for the periods named, and it is obvious that the considerations in favour of preventing enhancements during these periods apply with equal force to reductions of rents settled. The section has been amended so as to make it clear that reductions of the rents settled will not be permitted during these periods except on the ground of diminution of area or that specified in section 38 (*a*) of the Act." (Para 23, Objects and Reasons for Bill to amend the Tenancy Act).

Expenses of proceedings under Chapter.

114. [(1) When the preparation of a record-of-rights has been directed or undertaken under this Chapter], in any case except where a settlement of land-revenue is being or is about to be made, the expenses incurred by the Government in carrying out the provisions of this Chapter in any local area, [estate, tenure or part thereof (including expenses that may be incurred from time to time in the maintenance of boundary marks and other survey marks erected for the purpose of carrying out the provisions of this Chapter)], or such part of those expenses as the Local Government may direct, shall be defrayed by the landlords, tenants and occupants of land in that local area, estate, tenure or part in such proportions as the Local Government, having regard to all the circumstances, may determine.

(2) The portion of the aforesaid expenses which any person is liable to pay shall be recoverable by the Government as if it were an arrear of land revenue due in respect of the said local area, estate, tenure or part.

Explanation.—The word "tenure" in this section includes all revenue-free and rent-free tenures and holdings within a local area, estate or tenure.

Modifications made in the old section 114.

The modifications made by Bengal Act III of 1898 in the old section 114 were thus explained in the Statement of Objects and Reasons of the amending Bill :—

"A somewhat important change in this section is proposed. As the section now stands, the proportion of the costs of a survey and record-of-rights, to be defrayed by each individual landlord or tenant, must be recovered from him as an arrear of

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land-revenue under the Public Demands Recovery Act. It is practically impossible to carry out the provisions of the section as it stands. In Bihar, where there are small estates and a great number of co-sharer proprietors, the amount recoverable from each individual co-sharer is sometimes less than one anna. To issue a separate certificate against each one of the individual co-sharer landlords under such circumstances would only subject them to unnecessary expense, while endangering the realisation of the costs of the proceedings. It is therefore proposed to hold the whole estate or tenure, in case of proprietors and tenure-holders, liable for the proprietors' and tenure-holders' shares of the costs, respectively. Since doubts have been expressed as to whether the Revenue-officer has authority to record the names of holders of revenue-free or rent-free lands, unless the relationship of landlord and tenant is proved or admitted to exist,and therefore whether the holders of such lands are, under section 114, liable for any part of the costs of a survey and record-of-rights of the local area or estate in which they may be included, it is expressly provided that such lands are tenures for the purposes of this section, and therefore liable for their share of the costs, as they are also declared to be so liable under the alternative procedure for recovery of costs contained in Part III of Bengal Act III of 1895."

Procedure for recovery of expenses:—For the rules for the apportionment and recovery of costs under this section, see rules 4 to 17 chap. 17, Part III, of the Board's Survey and Settlement Manual, 1901, pp. 122—124. A further procedure for the recovery of the expenses of a survey and of the preparation of a record of rights is provided in Act III, B. C., of 1895, (The Land Records Maintenance Act) Part III, ss. 28—32 and 36 (1) (c).

Presumption as to fixity of rent not to apply where record-of-rights has been prepared.

115. When the particulars mentioned in section 102, clause (*b*), have been recorded under this Chapter in respect of any tenancy, the presumption under section 50 shall not thereafter apply to that tenancy.

The provision in this section against the presumption as to fixed rent has no application in a suit brought by a tenant for the purpose of contesting the correctness of the decision of a Revenue officer in regard to the entry as to the status of a raiyat in a record of rights. In such a suit the tenant is entitled to the benefit of the presumption.—(Secretary of state *v.* Kalimudin, I. L. R. 26 Cal, 617).

Bengal Act III of 1898, sections 8 9, and 11.

The following sections (8, 9 and 11) of Bengal Act III of 1898 do not form part of Chapter X of the present Act, but relate to it.

Validation of publication of past records.

8. All records published under section 105 of the Bengal Tenancy Act, 1885, before the commencement of this Act, whether in draft or final form, shall be deemed to have been duly published.

9. (1) Every settlement of rent or decision of a dispute by a Revenue-officer

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Effect of settlements of rent and decisions by Revenue-officers made before the commencement of this Act.

under section 104 or section 106 of the Bengal Tenancy Act, 1885, before the commencement of this Act, in respect of which no appeal has, before the commencement of this Act, been preferred to the Special Judge appointed under section 108 of that Act, shall have the force and effect of a decree of a Civil Court in a suit between the parties, and shall be final:

Provided that an appeal shall lie to the District Judge from any such settlement or decision which was made or given within thirty days before the commencement of this Act, if the appeal be presented within thirty days from the date of such settlement or decision.

XIV of 1882.

(2) The provisions of the Code of Civil Procedure relating to appeals shall, as nearly as may be, apply to all such appeals.

11. Bengal Act V of 1 4 (*an Act to remove doubts which have arisen in connection with the re settlement of land-revenue in temporarily-settled areas, and to amend the Bengal Tenancy Act*, 1885)

Repeal of Bengal Act V of 1894.

is hereby repealed.

Court-fees in surveys and settlements.

The following rules have been laid down for the levy of court-fees in surveys and settlements:—Survey and Settlement

Manual, 1900 p. 7.

Court-feee.

I. When a survey and record-of-rights are undertaken with a view to the settlement of land-revenue, applications or petitions to a Revenue-officer making a settlement of land-revenue, relating to matters connected with the assessment of land or the ascertainment of rights thereto, or interests therein, if presented before the final confirmation of the settlement under section 104F (3), are not chargeable with any fee [section 19 (ix) of the Court-fees Act of 1870].

Court-fees remitted in settlements of land-revenue.

2. In the case of proceedings under Chapter X of the Bengal Tenancy Act, as amended by Act III (B. C.) of 1898, when a settlement of land-revenue is not being, or about to be, made, a Revenue-officer is a Revenue-officer within the meaning of Schedule II, clause 1 (*b*), of the Court-fees Act; and applications or petitions filed before him, unless they are exempted under the several notifications contained in Rule 3 below, must be stamped with a court-fee of eight annas:

Definition of Revenue-officer and Revenue Court.

(i) Provided that, as when trying a suit instituted for the decision of a dispute under section 106, a Revenue-officer acts as a Civil Court, plaints in such cases shall be stamped according to the nature of the subject-matter in dispute, in accordance with Article I of Schedule I or Articles 5 and 17 of Schedule II of the Court-fees Act, and all applications and petitions made in the trial of such suits shall be stamped as required in the case of applications or petitions to a Civil Court under Schedule II of the Act.

(ii) Provided that applications for settlement of rents under section 105, Bengal Tenancy Act, must be stamped in accordance with Rule 3 (*ii*) below.

3. In exercise of powers conferred by section 35 of the Court-fees Act (VII of

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1870), and section 105, sub-section (3), of the Bengal Tenancy Act, 1885, as amended by the Bengal Tenancy (Amendment) Act, 1898, the Government of India, by Notifications Nos. 321 S. R., and 322 S. R., dated the 19th January 1899, have made the following rules:—

(*i*) Fees chargeable on applications or petitions of objection referring to any entry made, or proposed to be made, in a draft record-of-rights prepared under Chapter X of the Bengal Tenancy Act, 1885 (VIII of 1885), as amended by the Bengal Tenancy Act (Amendment) Act, 1898 (Bengal Act III of 1898) are remitted:

Provided that such applications or petitions are presented before the publication of such draft record under section 103A, sub-section (1), of the said Act.

(*ii*) When a record-of-rights is being prepared under Chapter X of the said Act, and an application is made under section 105 thereof for a settlement of rent, such application shall bear a stamp of eight annas for each tenant making, or joining, or joined in, the application.

Court-fees in appeals under sections 104G (1) and (2) and 108, Bengal Tenancy Act.

4. Appeals presented under section 104G (1) to a superior Revenue-authority, and applications for revision presented under section 108, will bear a court-fee of eight annas under Schedule II, (*b*) of the Court-fees Act, if the superior Revenue-authority is of lower standing than a Commissioner of a Division. If the authority is Commissioner of a Division or the Director of the Department of Land Records, or if an application for revision is made to the Board under section 104G (2), the fee will be one rupee, under Schedule II, 1 (*c*), of the Court-fees Act.

—(o)—

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CHAPTER XI.

RECORD OF PROPRIETOR'S PRIVATE LANDS.

"In dealing with the difficult question of *khamar* or *seraat* land, we have provided two alternative methods of procedure: (*a*) that of survey and registration of such land by a Revenue-officer, by order of the Local Government; (*b*) that of enquiry on the application of the individual landlord or tenant concerned. The former procedure would apply to large areas where the question is important. the latter to disputes about particular plots of land. At the request of the Government of Bengal the two methods of procedure have been left equally applicable to any part of the country. We have made no distinction in the description of this land hetween Bengal and Behar, but we have directed regard to be had in every case to local custom, and, while making it incumbent on revenne officer to record certain lands as proprietor's private land, have endeavoured to assit him by certain guiding rules in cases not clearly coming under these heads." (*Select Committee on B. T. No. III.*)

"The only amendment calling for notice in this chapter is the insertion of a provision in s. 116, that nothing in the Chap. (VI) relating to non-occupancy-raiyats shall apply to a proprietor's private lands. This merely expresses what was always intended, though by an oversight it was not previously provided for." (*Select Committee on B. T. Bill No. III.*)

Saving as to khamar land.

116. Nothing in Chapter V shall confer a right of occupancy in, and nothing in Chapter VI shall apply to a proprietor's private lands known in Bengal as khamar, nij or nij-jote, and in Behar as zeraat, nij, seer or kamat, where any such land is held under a lease for a term of years or under a lease from year to year,

The old law.—The old law was to the same effect: Section 6 of Act VIII of 1869 (B. C.) and of Act X of 1859, having defined an occupancy-raiyat or the conditions of an occupancy right, says: "But this rule does not apply to *khamar*, *nij-jote* or *seer* land belonging to the proprietor of the estate or tenure and let by him on lease for a term, or year by year."

Where held under a lease for years or from year to year.—The whole force of theisection lies upon the word *where*. Not that Chaps. V and VI do not apply to *khamar* lands at all, but they do not apply *where* it is held under a lease for term of years or under a lease from year to year. Accordingly it has been held that the fact of the land being *nij-jote* does not *per se* prevent a cultivator from acquiring rights of occupancy in it. This section excludes only *khamar*, *nij-jote*, and *seer* lands from the operation of such rights, only when such lands have been let by the proprietor on a lease for a term of years or year by year.—(Gourhari Singh *v.* Behari Raoot, 12 W. R., 278.)—It is only when *khamar* lands are let by the zemindar for a term of

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years, or from year to year, that the tenant does not acquire a right of occupancy, though he be in continuous possession for 12 year.—(Bhagwan Bhagat *v.* Jagmohan Roy, 20 W. R., 308; Shaik Ashruff *v.* Ram Kishore Ghose, 23 W. R., 288.) The right to hold *nij-jote* lands passes with the sale to the auction-purchaser, and the zemindar cannot claim any right of occupancy in those lands: his holding after the sale is in the capacity of an ordinary raiyat and must be dealt with accordingly—J Dutt Jha *v.* Bajee Ram Singh, 7 W. R., 40. A zemindar occupying his own lan as *nij-jote* cannot, when the zemindari passes into other hands, lay claim to the m on the ground that he is a raiyat with the rights of occupancy.—(Reed *v.* Sree Kishen Singh, 15 W. R., 430.) A *zamindar* claiming certain land as *sirat* land failing to prove this plea, is yet entitled to a decree for possession, when the defendants are unable to prove that they have rights of occupancy, or even that they are tenants of the plaintiff.—(Batai Ahir *v.* Bhagabati Kuar, 11 C. L. R., 476). A landlord seeking to obtain an enhanced rate of rent on account of *nij-jote* held by a tenant without a right of occupancy has no right to obtain a judicial assessment. He can serve his tenant with notice to quit unless he agrees to pay the rent required, and if the tenant continues in occupation, he must be taken by implication to pay the enhanced rent.—(Janu Munder *v.* Brijoo Singh, 22 W. R., 548.) This section applies even in a case in which a person is brought on the *malik's* (proprietor's) *sirat* land as a *raiyat* by a lease for a term of years; therefore such a person cannot acquire any right of occupancy or non-occupancy on the said land; and he, being a trespasser only, is liable, on the expiry of the lease of the lessee to ejectment.—Sheonandan Roy *v.* Ajodh Roy I. L. R., 26 Cal., 546; 3 C. W. N., 336.

Proprietor and not a tenure-holder:—The section again contemplates a proprietor's (cl. 2 of s. 3) private land; a *putnidar* or a tenure-holder will have therefore no private land whatever.

Power for Government to order survey and record of proprietor's private lands

117. The Local Government may, from time to time, make an order directing a Revenue-officer to make a survey and record of all the lands in a specified local area which are a proprietor's private lands within the meaning of the last foregoing section.

Survey and Settlement by Government:—The Select Committee in their report on the Bengal Tenancy Act Bill observed as follows:—

"In dealing with the difficult question of *khamar* or *sirat* land, we have provided two alternative methods of procedure:—(*a*) that of survey and registration of such land by a Revenue officer, by order of the Local Government; (*b*) that of enquiry on the application of the individual landlord or tenant concerned. The former procedure would apply to large areas where the question is important, the latter to disputes about particular plots of land." For rules, see Local Government Rules, Chapter IV, Appendix,

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118. In the case of any land alleged to be a proprietor's private land, on the application of the proprietor or of any tenant of the land, and on his depositing the required amount for expenses, a Revenue-officer may, subject to, and in accordance with, rules made in this behalf by the Local Government, ascertain and record whether the land is or is not a proprietor's private land.

Power for Revenue-officer to record private land on application of proprietor or tenant.

For rules under this section, see Chapter IV of the Local Government rules, Appendix.

119. When a Revenue-officer proceeds under either of the two last foregoing sections, the provisions of [sections 103A, 103B. 106, 107, 108, 109, and 109A] shall apply.

Procedure for recording private land.

120. (1) The Revenue-officer shall record as a proprietor's private land—

Rules for determination of proprietor's private land.

(*a*) land which is proved to have been cultivated as *khamar, zirát, sir, nij, nij-jote* or *kámat* by the proprietor himself with his own stock or by his own servants or by hired labour for twelve continuous years immediately before the passing of this Act and (*b*) cultivated land which is recognized by village usage as proprietor's *khámár, zirat sír, nij, nij-jote or kamát.*

(2) In determining whether any other land ought to be recorded as a proprietor's private land, the officer shall have regard to local custom and to the question whether the land was, before the second day of March 1883, specifically let as proprietor's private land, and to any other evidence that may be produced; but shall presume that land is not a proprietor's private land until the contrary is shown.

(3) If any question arises in a Civil Court as to whether land is or is not a proprietor's private land, the Court shall have regard to the rules laid down in this section for the guidance of Revenue-officers.

Sub-section (2). Any other evidence that may be produced:—"Under sub-section 2 of this section the law allows three matters to be taken into consideration in de termining whether the land should be recorded as the proprietor's private land. The first

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is local custom ; the second is whether the land was, before the second day of March, 1883, specifically let as the proprietor's private land ; and the third is 'any other evidence that may be produced.'...It seems to us that in enacting the sub-section the legislature had before it the attempts which might be expected on the part of landlords to frustrate the intention of the legislature, as asserted in the draft Bill laid before the Council for consideration, to extend the occupancy rights of tenants before the measures then declared to be in contemplation became law ; and, therefore, the particular date and day of March, 1883, the date on which the draft Bill was published in the Gazette, and leave was obtained to introduce the Bill into the Council, was declared to be the latest date on which there should be free action on part of the *semindars* to assert their private rights so as to prevent the accrual of special tenant rights. It was accordingly declared that it was a material point, in the consideration of such a matter as is now raised in appeal befere us, whether the particular lands were before the 2nd day of March, 1883, specifically let, as the proprietor's private lands. From this we may take it that it was intended that regard should be had to any declarations made before that date by the landlord, and communicated to the tenants, in respect to the reservation of the proprietor's right over the land. In this view we think that the following words in that sub-section 'any other evidence that may be produced' must mean any other evidence tending in the same direction, that may be produced to show the assertion of any title on the part of the proprietor, and communicated to the tenant before that date."—(Nilmani Chakravartti *v.* Baikantho Nath Bera, I. L. R., 17 Cal., 466).

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CHAPTER XII.

This chapter came into operation on the 1st February 1886—See Act XX of 1885. The Rent Commission proposed to abolish the law of distraint. They remarked :— "This is an offset of English law originally introduced into this country by Regulation XVII of 1793, which empowered certain specified landlords to distrain and sell the crops and products of the earth of every description, the grain, cattle, and all other personal property (whether found in the house or on the premises of the defaulter or of any other person) belonging to their tenants. This continued to be the law until 1859, when the power of distraint was limited to the produce of the land on account of which the rent is due. There can be little doubt that this change considerably impaired the coercive efficacy of this procedure as a means of recovering rent ; and we are afraid that the provisions of the present law are not always strictly attended to. There is evidence of positive abuse of these provisions in Behar ; and the experience of some of us is, that they have not always been used in a regular manner in other parts of the country. The present chapter is a compromise of that proposal made by the Bengal Government in consideration of the opposition made by the landlords. This chapter should be read with s. 186.

DISTRAINT.

Cases in which an application for distraint may be made.

121. Where an arrear of rent is due to the landlord of a raiyat or under-raiyat, and has not been due for more than a year, and no security has been accepted therefor by the landlord, the landlord may, in addition to any other remedy to which he is entitled by law, present an application to the Civil Court, requesting the Court to recover the arrear by distraining, while in the possession of the cultivator,—

(*a*) any crops or other products of the earth standing or ungathered on the holding ;

(*b*) any crops or other products of the earth which have been grown on the holding and have been reaped or gathered and are deposited on the holding or on a threshing-floor or place for treading our grain, or the like, whether in the fields or within a homestead :

Provided that an application shall not be made under this section—

(1) by a proprietor or manager as defined under the Land Registration Act, 1876, or a mortgagee of such a proprietor or manager, unless his

Ben. Act VII of 1876.

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name and the extent of his interest in the land in repect of which the arrear is due have been registered under the provisions of that Act; or

(2) for the recovery of any sum in excess of the rent payable for the holding in the proceeding agricultural year, unless that sum is payable under a written contract or in consequence of a proceeding under this Act or an enactment hereby repealed; or

(3) in respect of the produce of any part of the holding which the tenant has sub-let with the written consent of the landlord.

Old Act:—See ss 68, 69 and 71 of Act VIII B.C. of 1869, ss 112, 113 and 115 of Act X of 1859.

The landlord may present an application &c:—Is a co-sharer entitled to distraint? see s. 188, *ante*. Is the gomashta entitled to make an application under this section? *Vide* section 187 of this Act, and also s. 70 of the old Act. "Gomashtas employed in the collection of rent are not permitted to distrain unless expressly 'authorized by power-of-attorney on that behalf.' To distrain for rent is not within the general scope of a gomashta's authority, and the landlord would not therefore be liable for the acts of a gomoshta, who had not been expressly authorized by him to distrain." (*Bell* in his *Landlord and Tenants' Act*.) Where, however, a landlord did actually order the gomashta to make the distress, he would be liable for the illegal distress, although it was not made under a written authority. So if the gomashta paid to the landlord the proceeds of the distress, and the landlord received such proceeds, knowing that they had been obtained by distress, he would, by thus accepting and ratifying the act of the gomashta, render himself as responsible for the act of the gomashta as if he had expressly authorized the illegal act.—(Ram Joy Mundle *v.* Kally Mohon Roy Chowdry, Marsh., 282; Samasundari Debia v. Mallyat Mundle, 11 W. R., 101.) Under the present law, however, there being no private distraint, it is presumed a gomashta may as well make an application and verify it (Compare s. 187, *post*.) A landlord cannot distrain crops for arrears due, not from the tenant, but from another person not in possession and who did not cultivate the crops.—(Mohinee Dassee *v.* Ram Kumar kurmokar, Sp. W. R., Act X, 77.) With regard to what crops are subject to distress it is said as follows: "We have considered the sections of Act X of 1859 by virtue of which the right of distress is now exercised in these provinces, and having regard to the whole of those sections we are of opinion that the term 'produce of land' is to be construed as equivalent to that which can be gathered and stored, crops of the nature of cereal, or grass or fruit crops, and it does not apply to the trees from which the crops, if fruit crops, are gathered. The law of distress in Act X of 1859 is substantially a re-

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enactment of the law of distress provided by Regulations XVII of 1793, XXXV and XLV of 1795, and that again has evidently been adopted from the English Statute Law. Now by Statute Geo. 2, c. 19, s. 8, landlords are empowered to distrain corn, grass or other product growing upon any part the land demised, and it has been held that the term product in the section above quoted applies to such products only as are similar to those specified, to all of which the process of becoming ripe, and of being cut, gathered, made, and laid up when ripe, is incidental. Hence trees, shrubs, and plants growing in a nursery ground cannot be distrained for rent.—Selwyn's N. P,, p 669. The provisions of Act X appear to us also to refer only to such produce of the land as becomes ripe and is cut, gathered and stored."—(Sheo Pershad Tewary *v.* Musst. Mohema Beebee, 1 All., 76.)

Proprietor:—"Proprietor," as defined in Act VII of 1876 (B.C.) means "every person being in possession of an estate or revenue-free property, or of any interest in an estate or revenue-free property as owner thereof; and includes every farmer and lessee who holds an estate or revenue-free property directly from or under the Collector."

Written Contract:—See ss. 9 and 43 and 48, *ante*.

Sublease:—Under the old law it was held that when the tenant had sublet the land, the crops of the sub-tenant were subject to distraint for rent due from the tenant.—(Geetun Sing *v.* Baldeo Kahar, 4 All., Rep., 76.)

Form of application.

122. (1) Every application under the last foregoing section shall specify—

(*a*) the holding in respect of which the arrear is claimed, and the boundaries thereof, or such other particulars as may suffice for its identification;

(*b*) the name of the tenant;

(*c*) the period in respect of which the arrear is claimed;

(*d*) the amount of the arrear, with the interest, if any, claimed thereon; and when an amount in excess of the rent payable by the tenant in the last preceding agricultural year is claimed, the contract, or proceeding, as the case may be, under which that amount is payable;

(*e*) the nature and approximate value of the produce to be distrained;

(*f*) the place where it is to be found, or such other particulars as may suffice for its identification; and

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(*g*) if it is standing or ungathered, the time at which it is likely to be cut or gathered.

(2) The application shall be signed and verified in the manner prescribed by the Code of Civil Procedure for the signing and verification of plaints.

XIV of 1882.

Court-fee :—Every application for distraint is subject to a court-fee of eight annas—see Act VII of 1870, Schedule II, Art. 1, clause (*b*), second paragraph.

Procedure on receipt of application.

123. (1) The applicant shall, at the time of filing an application under the foregoing sections, file in Court such documentary evidence (if any) as he may consider necessary for the purposes of the application.

(2) The Court may, if it thinks fit, examine the applicant and shall, with as little delay as possible, admit the application or reject it, or permit the applicant to furnish additional evidence in support of it.

(3) Where a Court cannot forthwith admit or reject an application under sub-section (2), it may, if it thinks fit, make an order prohibiting the removal of the produce specified in the application pending the execution of an order for distraining the same or the rejection of the application.

(4) When an order for distraining any produce is made under this section at a considerable time before the produce is likely to be cut or gathered, the Court may suspend the execution of the order for such time as it thinks fit, and may, if it thinks fit, make a further order prohibiting the removal of the produce pending the execution of the order for distraint.

The High Court has laid down the following rules under this Act:—

(5) All applications to distrain shall be presented and heard in open Court. The examination mentioned in s. 123, sub-s. (2), shall be on oath or affirmation.

(6) All such applications and all notices of distraint under s. 141 shall be entered in a register to be called the "Distraint Register," which shall be kept in the form annexed.—(See High Court Circulars and Orders).

A copy of every such application to be furnished by the applicant, shall be given to the officer appointed to make the distraint and a copy of the notice under s. 141, to be similarly furnished by the applicant, shall be given to the officer placed in charge of the distrained property.

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Execution of order for distraint.

124. If an application is admitted under the last foregoing section, the Court shall depute an officer to distrain the produce specified therein, or such portion of that produce as it thinks fit; and the officer shall proceed to the place where the produce is, and distrain the produce by taking charge of it himself or placing some other person in charge of it in his behalf and publishing a notification of the distraint in accordance with rules to that effect to be made by the High Court.

Provided that produce which from its nature does not admit of being stored shall not be distrained under this section at any time less than twenty days before the time when it would be fit for reaping or gathering.

The High Court has made the following rules under this section:—

(7.) The officer deputed to make a distraint under s. 124, or to take charge of produce distrained under s. 141, must in all cases be able to read and write the language of the district.

(8.) The written demand under s. 125 shall be framed in accordance with the entries contained in the application or notice referred to in Rule 2.

(9.) The notification of distraint directed in s. 124, Act VIII of 1885, shall be published,—

By fixing up in a conspicuous part of the holding or other place in which the produce is, a notice that such produce has been distrained, and by proclaiming at the same time the contents of the notice by beat of drum.

(10.) The notice shall specify the name of the person at whose instance the distraint is made, the name of the defaulter, the name of the person in whose charge the produce has been placed, and the amount of the arrear due; and it shall direct any person intending to reap, gather, or store the crop or produce, if unreaped or ungathered, or intending to do any other act, necessary for its preservation, to give due notice of his intention to the person who has been placed in charge.

(11.) The notice shall be fixed up in the presence of not less than two persons, in addition to the agent of the distrainer, who points out the crop or produce.

(17.) All officers deputed to distrain property under this chapter shall, if there is, a post office in the vicinity, report to the Court by letter immediately that distraint is made, or if there is no such post office, shall, immediately on his return, report in writing the nature and extent of the crop or produce distrained, the day on which the distraint was the name made of the person, (if any), placed in charge of the crop, and the day fixed for the sale, or if the sale has taken place, the day on which it took place. He shall also, immediately on his return, file an account of all money received and disbursed by him, together with the receipts for the same and the record of the biddings, at the sale if a sale has taken place.

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Service of demand and account.

125. (1) The distraning officer shall, at the time of making distraint, serve on the defaulter a written demand for the arrear due, and the costs incurred in making the distraint, with an account exhibiting the grounds on which the distraint is made.

(2) Where the distraning officer has reason to believe that a person other than the defaulter is the owner of the property distrained, he shall serve copies of the demand and account on that person likewise.

(3) The demand and account shall, if practicable, be served personally; but if a person on whom they are to be served absconds or conceals himself, or cannot otherwise be found, the officer shall affix copies of the demand and account on a conspicuous part of the out-side of the house in which he usually resides.

Old Act.—S. 72 of Act VIII 1869, B. C., and s. 116 of Act X of 1859.

The High Court has proposed the following rule under this section :—

"8. The written demand under section 125 shall be framed in accordance with the entries contained in the application or notice referred to in rule 6" (*i.e.*, notice of distraint under s. 141, post.)

Right to reap, &c., produce.

126.(1) A distraint under this chapter shall not prevent any person from reaping, gathering or storing any produce, or doing any other act necessary for its due preservation.

(2) If the person entitled to do so fails to do so at the proper titme, the distraining officer shall cause any standing crops or ungathered products distrained to be reaped or gathered when ripe, and stored in such granaries or other places as are commonly used for the purpose, or in some other convenient place in the neighbourhood, or shall do whatever else may be necessary for the due preservation of the same.

(3) In either case the distrained property shall remain in charge of the distraining officer, or of some other person appointed by him in this behalf.

The High Court has proposed the following rule under sub-section (2) :—

(12.) In the event of it being necessary for the distraining officer, or the officer placed in charge of distrained property, to reap, to gather, or store any crops or produce, or to do any other acts for the due preservation of the same, as provided by s. 126, the person at whose instance the distraint was made shall advance the funds necessary to this end.

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For the charge to be made on the landlord under this rule, *see* Local Government rule under s. 134. The rule prescribes a charge of four annas for each man employed and the actual hire of threshing-floor or store-house, if necessary.

Sale proclamation to be issued unless demand is satisfied.

127. (1) Unless the demand, with all costs of the distraint, be immediately satisfied, the distraining officer shall issue a proclamation specifying the particulars of the property distrained and the demand for which it is distrained, and notifying that he will, at a place and on a day specified, not being less than three or more than seven days after the time of making the distraint, sell the distrained property by public auction:

Provided that when the crops or products distrained from their nature admit of being stored, but have not yet been stored, the day of the sale shall be so fixed as to admit of their being made ready for storing before its arrival.

(2) The proclamation shall be stuck up on a conspicuous place in the village in which the land is situate for which the arrears of rent are claimed.

Place of a sale.

128. The sale shall be held at the place where the distrained property is, or at the nearest place of public resort if the distraining officer is of opinion that it is likely to sell there to better advantage.

Old Act:—Section 129 of Act X of 1859 and section 86 of Bengal Act VIII of 1869.

When produce may be sold standing.

129. (1) Crops or products which from their nature admit of being stored shall not be sold before they are reaped or gathered and are ready for storing.

(2) Crops or products which from their nature do not admit of being stored may be sold before they are reaped or gathered; and the purchaser shall be entitled to enter on the land by himself, or by any person appointed by him in this behalf, and do all that is necessary for the purpose of tending and reaping or gathering them.

Manner of sale.

130. The property shall be sold by public auction, in one or more lots as the officer holding the sale may think advisable; and, if the demand, with the costs of distraint and sale, is satisfied by the sale of a

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portion of the property, the distraint shall be immediately withdrawn with respect to the remainder.

Old Act:—Section 129 of Act X of 1859 and section 86 of Bengal Act VIII of 1869.

Postponement of sale.

131. If, on the property being put up for sale a fair price (in the estimation of the officer holding the sale) is not offered for it, and if the owner of the property, or a person authorized to act in his behalf, applies to have the sale postponed till the next day, or (if a market is held at the place of sale) the next market-day, the sale shall be postponed until that day, and shall be then completed, whatever price may be offered for the property.

Old Act:—S. 130 of Act X of 1859 and s. 87 of Act VIII B. C. of 1869. The High Court has prescribed the following rule under this section:—(13) The officer holding a sale under s. 131 shall record a description of the property offered for sale, the names of all persons bidding for the same, and the amount bid by each, and if the sale is postponed, he shall record an order to this effect and shall then and there notify the place where and the time when the sale will be held."

Payment for purchase-money.

132. The price of every lot shall be paid at the time of sale, or as soon thereafter as the officer holding the sale directs, and in default of such payment the property shall be put up again and sold.

Old Act:—S. 131 of Act X of 1859 and s. 88 of Act VIII of 1869 B. C.

Certificate to be given to purchaser.

133. When the purchase-money has been paid in full, the officer holding the sale shall give the purchaser a certificate describing the property purchased by him and the price paid.

Proceeds of sale how to be applied

134. (1) From the proceeds of every sale of distrained property under this chapter, the officer holding the sale shall pay the costs of the distraint and sale, calculated on a scale of charges prescribed by rules to be made, from time to time by the Local Government in this behalf.

(2) The remainder shall be applied to the discharge of the arrear for which the distress was made, with interest thereon up to the day of sale; and the surpuls (if any) shall be paid to the person whose property has been sold.

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Old Act.—S. 132 of Act X of 1859, and s. 89 of Act VIII B.C.of 1869.

The Local Government has prescribed the following scale of charges under this Act :—

(*a*) In respect of the warrant of distraint–8 annas.

(*b*) In respect of each man necessary to effect the distraint and also to ensure safe custody, where such man is to be left in actual possession—4 annas a day.

(*c*) In respect of action taken under section 126 (clause 2) for the reaping, storing, or the preservation of the crop distrained—4 annas a day for every person employed and in addition actual hire of threshing-floor or store house, if necessary.

"In addition to the charges under clauses (*a*), (*b*) and (*c*) above railway-fare, boat-hire, and ferry-charges will be levied when necessary as under Rule 3 of this chapter" (*i.e.*, Rule 3 printed under s. 17, p. 59, *ante*, *q. v.*)

The High Court has prescribed the following rules for regulating the procedure under this section :—

"14. When the sale is concluded and the sale-proceeds are realized, the officer who held the sale shall, after paying the costs of the distraint and sale as directed in section 134, forthwith pay the balance into Court.

"15. The officer holding the sale shall take separate receipts for all sums paid by him as costs of the distraint and sale under section 134, sub-section (1), and if the person giving the receipt is unable to write, the receipt shall be attested by some person able to do so."

135. Officers holding sales of property under this Act, and all persons employed by, or subordinate to such officers, are prohibited from purchasing either directly or indirectly, any property sold by such officers.

Certain persons may not purchase.

Old Act:—Section 133 of Act X of 1859 and section 90 of Bengal Act VIII of 1869.

136. (*1*) If, at any time after a distraint has been made under this Chapter, and before the sale of the distrained property, the defaulter, or the owner of the distrained property, where he is not the defaulter, deposits in the Court issuing the order of distraint, or in the hands of the distraining officer, the amount specified in the demand served under section 125, with all costs which may have been incurred after the service of the demand, the Court or officer, as the case may be, shall grant a receipt for the same, and the distraint shall forthwith be withdrawn.

Procedure where demand is paid before the sale.

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(2) When the distraining officer receives the deposit, he shall forthwith pay it into the Court.

(3) A receipt granted under this section to an owner of distrained property, not being the defaulter, shall afford a full protection to him against any subsequent claim for the arrears of rent on account of which the distraint was made.

(4) After the expiration of one month from the date of a deposit being made under this section, the Court shall pay therefrom to the applicant for distraint the amount due to him, unless in the meanwhile the owner of the property distrained has instituted a suit against the applicant contesting the legality of the distraint and claiming compensation in respect of the same.

(5) A landlord shall not be deemed to have consented to his tenant's sub-letting the holding or any part thereof merely by reason of his having received an amount deposited under this section by an inferior tenant.

Old Act:—S. 121 of Act X of 1859, and s. 77 of Act VIII of 1869, B. C.

Sub-section (6):—The High Court has prescribed the following rule for regulating the procedure under sub-section (1):—

"16. When a distraint is withdrawn under section 136, the notification of distraint, published under section 124, shall be taken down."

Amount paid by under-tenant for his lessor may be deducted from rent.

137. (1) When an inferior tenant, on his property being lawfully distrained under this chapter for the default of a superior tenant, makes any payment under the last foregoing section, he shall be entitled to deduct the amount of that payment from any rent payable by him to his immediate landlord, and that landlord, if he is not the defaulter, shall in like manner be entitled to deduct the amount so deducted from any rent payable by him to his immediate landlord, and so on until the defaulter is reached.

(2) Nothing in this section shall affect the right of an inferior tenant making a payment under the last foregoing section to institute a suit for the recovery from the defaulter of any portion of the amount paid which he has not deducted under this section.

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Conflict between rights of superior and inferior landlords.

138. When land is sub-let, and any conflict arises under this chapter between the rights of a superior and of an inferior landlord who distrain the same property, the right of the superior landlord shall prevail.

Distraint of property which is under attachment.

139. When any conflict arises between an order for distraint issued under this chapter and an order issued by a Civil Court for the attachment or sale of the property which is the subject of the distraint, the order for distraint shall prevail; but, if the property is sold under that order, the surplus-proceeds of the sale shall not be paid under section 134 to the owner of the property without the sanction of the Court by which the order of attachment or sale was issued.

Old Act:—Secion 68 of Act VIII of, 1869, B.C.; see s. 65.

Suit for compensation for wrongful distraint.

140. No appeal shall lie from any order passed by a Civil Court under this chapter; but any person whose property is distrained on an application made under section 121 in any case in which such an application is not permitted by that section may institute a suit against the applicant for the recovery of compensation.

Old Act:—Act VIII, 1869, B. C.; s. 96. Act X, 1859, *s.* 139.

Jurisdiction of Small Cause Court:—Under art. 35 (*i*) of schedule II of the Provincial Small Cause Courts Act (IX of 1887), the Small Cause Court has no jurisdiction to entertain suits for compensation for illegal, improper or excessive distress or attachment:—Hydar ali *v.* Jafar ali, I. L. R., Cal., 183. That article applies generally to acts done under colour of distress; and the relationship between the parties, whether in question or not, would not alter the jurisdiction of the Court.—Dewan Roy *v.* Sundar Tewary, I. L. R., 24 Cal., 163. A suit, therefore, for money paid to redeem a distraint is cognizable by the Small Cause Court because it stands on the same footing as any other suit where it is alleged that the defendant has received money which in justice and equity belongs to the plaintiff, but a claim for damages for illegal distraint stands in a different position. Hence a suit for money paid to redeem a distraint and also for damages, is not cognizable by the Small Cause Court; a second appeal would not be barred in such a case under section 586 of the Code of Civil Proceedure.—*Ibid.* A suit to establish a right to a standing crop on the basis of title to the land is not cognizable by the Small Cause Court.—Dakhyani Debea *v.* Gobind Chowdhry, [1893], I. L. R., 21 Cal., p. 430.

Title to standing crop.

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Plaintiff sued to recover Rs. 304-12-9 which he had to pay into Court in order to obtain the release of his crops from attachment together with Rs. 7-0-9 dams, the costs alleged to have been incurred in making the attachment, The plaintiff's case was that the principal defendant had wrongfully caused his crops to be distrained under color of s. 121, *held* that the claim being not only for the recovery of the sum paid, but also for damages, namely, the cost alleged to have been incurred in paying it, it was a suit for compensation for illegal distress such as was contemplated by Art. 35 (j) of the second schedule of the Provincial Small Cause Courts Act:—Jugdeo Singh *v.* Padarath Ahir, I. L. R., 25 Cal., 285.

Maintainability of suit:—A suis for compensation for illegal distraint is maintainable only on the ground that the distraint was made in violation of the provisions of s. 121 of the Act:—Hanuman *v.* Gobind Koer, 1 C. W. N., 318. See notes under ss. 121 and 122. A suit under this section lies against a landlord who abuses his power of distraint by distraining the crops which belong to the tenant on the pretence that they belong to another person:—Jagdeo *v.* Padarath I. L. R., 25 Cal., 285. "There has been an invasion of the rights of the tenant for which he is entitled to a remedy, and if the case is not one of the kind contemplated by s. 140, he is not, so far as we can see, deprived by the provisions of that section of the ordinary right of action which any person who suffers from a tortious act has against the tortfeasor."—(*Per* Trevelyan and Stevens, JJ.) *Ibid* at p. 288. Before a tenant can obtain any decree for damages on the ground of illegal distraint, he must prove what loss he has actually sustained:—Oojan *v.* Pran Nath, 8 W. R., 220. "What they (the palintiffs) are entitled to under s. 140 is compensation for damage done to them, and in such a suit as this, they must shew how they have been endamaged. Now the amount, which they may be entitled to as damages would seem to consist of two sums: (*i*). Any excess amount realised from them; and (*ii*) any amount to which they might be entitled owing to the way in which their crops have been sold off."—*Per* Rampini and Gupta, JJ., Sheobarot *v.* Nawarangdeo, I.L R., 28 Cal., 364 at p. 369. I. L. R.,

Tortious acts of servant:—In a suit by a tenant to recover the value of crops alleged to have been carried off by the orders of the landlord, it was found that there had been long continued litigation between the parties, that the landlord was determined in getting khas possession of the land and had refused to recognise the tenant, that the actual perpetrators of the trepass were her confidential servants specially employed in matters concerning her landed property, and that the act done was in furtherence of her known wishes and for her benefit, *held* that the landlord's knowledge and concurrence could be presumed from these facts.—Shama Sonduree *v.* Mallyut Mundal, 11 W. R., 101. Unless it is shown that a servant of the ladlord acted under the landlord's authority, the latter cannot be made answerable for the servant's tortious acts, though for his benefit. *Ibid* See also Ramjai Mundle *v.*

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Kisto Mohan Roy Chowdhury, Marsh, 282. The question has been much simplified under sections 122 (2) and 145 of this Act.

Onus:—In a suit for recovery of compensation the onus lies upon the plaintiff to prove the annual rent payable by him.—Chunder Kant v. Ram Lal, 1 C. W. N, lxxii. In a suit by a tenant for damages for wrongful distraint the landlord is required to prove the fact of tenancy and the amount of jama; and if the tenant pleads payment the onus is on the tenant to prove his allegation.—Oojan Dewan v. Pran Nath 8 W. R., 220.

Limitation:—The period of limitation for a suit for compensation under section 140 will be governed by Art. 2, Schedule 11, of Act XV of 1877 (the Indian Limitation Act), and will run from the date of the last act done under the provisions of section 124 *ante*, in order to effectuate the distress.

Penalties:—The penalties for illegal interference with produce are indicated in section 186, *post*.

Power for Local Government to authorize distraint in certain cases.

141. (1) When the Local Goverment is of opinion that in any local area or in any class of cases it would, by reason of the character of the cultivation or the habits of the cultivators, be impracticable for a landlord to realize his rent by an application under this chapter to the Civil Court, it may from time to time, by order, authorize the landlord to distrain, by himself or his agent, any produce for the distraint of which he would be entitled to apply under this chapter to the Civil Court:

Provided that every person distraining any produce under such authorization shall proceed in the manner prescribed by section 124, and shall forthwith give notice, in such form as the High Court may, by rule, prescribe, to the Civil Court having jurisdiction to entertain an application for distraining the produce, and that Court shall, with no avoidable delay, depute an officer to take charge of the produce distrained.

(2) When an officer of the Court has taken charge of any distrained produce under this section, the proceedings shall thereafter be conducted in all respects as if he had distrained it under section 124.

(3) The Local Goverment may at any time rescind any order made by it under this section.

The High Court has prescribed the following form of notice under sub-s. (2):—

"18. Every person distraining produce by virtue of the authority conferred on him under section 141 of Act VIII of 1885, shall give notice of such distraint to the

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Civil Court having jurisdiction to entertain an application for the distraint of such produce in a tabular form which shall contain the following particulars :—

(*a*) The name and address of the person at whose instance the distraint was made, and a description of his interest in the property, whether as proprietor tenure-holder, or raiyat.

(*b*) The name of the defaulter and of the place in which he resides or was known to be last residing.

(*c*) The amount of the arrear with interest, if any, and the period in respect of which it is claimed.

(*d*) The holding in respect of which the arrear is claimed. the boundaries thereof, or such other particulars as may suffice for its identification.

(*e*) The description and approximate value of the propuce distrained, and if the same has been reaped or gathered, the place in which it is stored.

(*f*) The name of the person by whom the distraint was actually made, and the name and address of the person in whose charge the produce has been placed.

(*g*) The date on which the distraint was made.

(*h*) If the crop or produce is standing or ungathered, the time at which it is likely to be cut or gathered."

Power for High Court to make rules.

142. The High Court may from time to time make rules consistent with this Act for regulating the procedure in all cases under this chapter.

The High Court has prescribed rules under this section and they have been quoted under the appropriate sections of this chapter.

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CHAPTER XIII.

JUDICIAL PROCEDURE.

This Chapter forms one of the most important parts of the Bengal Tenancy Act but it is not exhaustive, and does not embody certain principles and rules of practice upon which it is based.

Relating to the law of Landlord and Tenant:—As observed at p. *2 ante*, the application of this Act obtains mainly where the relation of landlord and tenant exists between the parties: In order to succeed in a rent suit, it must be shown that the relations of landlord tenant exist between the parties. Mr. Field observes in his Digest, Article 4, Chapter I, Part I:

"The relation of landlord and tenant subsists—(i) where it has been created by a contract valid according to the law in force at the time of executing such contract: (ii) where it is reasonably implied from the acts of the parties: (iii) where it has been created or continued by the operation of law;" (iv) (we may add) or by change of parties. We shall follow these orders in discussing the relation of landlord and tenant and shall also discuss how the relation terminates.

1. Where relation of landlord and tenant exists by express contract. (A) Competence of the parties, (B) freedom of assent, (C) lawfulness of the consideration, and (D) lawfulness of object are the four points which render an agreement to be a contract. Section 10 of the Indian Contract Act provides: "All agreements are contracts if they are made by the free consent of the parties competent to contract for a lawful consideration and with a lawful object and are not hereby expressly declared to be void. Nothing herein contained shall affect any law in force in British India and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses or any law relating to the registration of documents."

(A). Competence of Parties.—Section 11 of the Indian Contract Act provides: "Every person is competent to contract (1) who is of the age of majority according to the law to which he is subject, and (2) who is of sound mind, and is not disqualified from contracting by any law to which he is subject," (we may add) provided (3) that the contracting party do not act in excess of his own interest.

(1.) *Minority.*—For all persons domiciled in British India, Act IX of 1875 prescribes that the period of minority shall last until the completion of the 18th year, unless the minors have guardians appointed for them by a Court, or are brought under the charge of the Court of Wards,—in which case they will attain majority upon the completion of the 21st year. Of course if the minor contracts through his lawful guardian acting for his interest, the contract would be valid. But if he acts himself, will his contract be voidable or void? Mr. Field in a note to his Digest observes: "Under the Indian Contract Act, contracts made by minors are absolutely void, not voidable merely. Under the English law, a lease made by a minor lessor is voidable by him on his coming of age but not before, or by his heir if he

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die under age: it cannot be avoided by the lessee.—(Woodfall, 35; Smith, 61, 62.) So a lease to a minor lessee (unless it be for necessary lodging), may be avoided by him within a reasonable time after coming of age, but is not absolutely void.—(Woodfall, 66; Smith, 69-71; Fawcett, 5.)" Sir Richard Garth, C. J., seems to dissent from this opinion. He asks:

"1stly.—are contracts made by a minor, notwithstanding section 11 of the Contract Act absolutely void or voidable only at the minor's option? I should say they are or ought to be only voidable. "Could a lessee, for instance, having taken a lease from a minor and having entered into possession and had the benefit of two lucrative seasons, throw the lease up afterwards whenever it suited his purpose? or could the lessee after having taken possession, avoid such lease at all?

"2ndly.—Could the minor avoid the lease before he came of age, whether the lessee could avoid it or not?

"3rdly.—Could not a minor lessee avoid a lease for the future, even for necessary lodging? Is he ever liable for necessaries which have not actually been supplied? "As for example, suppose he were to enter into a contract for supply to him of so many loaves a day for a month, would the contract be binding on him except so for as he had enjoyed the benefit of it? I think not. I consider that the same principle applies to a contract for future lodging. Hands v. Slaney, 8, Term Reports, 571, which is the case referred to by Woodfall, was an action for use and occupation. No doubt a minor would be liable for that. The just and proper rule would seem to be that leases both to and by minors should be voidable only at their option."—(R. C.R. 11, p. 357.)

(2) *Of sound mind.*—"A person is said to be of sound mind for the purpose of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests." (Section 12 of the Indian Contract Act.)

(3) *Acting in excess of interest.*—See s. 194 of this Act. Mr. Field thus sums up the law on this point by article 6 of his Digest: "No person having a limited interest in land is competent to grant a lease which shall be valid for any purpose or period in excess of his own interest." A lease of the minor's interest and of something in excess is void as to the excess merely and is valid to the extent of the lessor's interest.—(Reg. XVIII of 1812, s. 2; Woodfall.) This article has been taken from (1) Musst. Mohan Koer *v.* Zoramun, Marsh., 166, which held that a Hindu widow can grant a lease for her life only. (2) Dumri *v.* Bissessur Lal, 15 W. R., 291, which ruled that on occupancy-raiyat can create a mokarari lease to the extent of his own interest; and (3) Harish Chunder *v.* Srikali, 22 W.R., 274, which laid down that a lessee cannot make an underlease for a longer term than his own lease. There are two provisoes to this article e. g.; (A) provided that, if the lessor acquire such excess after the execution of the lease, such lease is valid as against him for such excess also.—(Evidence Act, s. 115; W.P.R., 165; 1 N.W.P. Rep., 103; 20 W.R., 292 (B) Provided

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that the following leases are valid (article 7): (1) A lease or farm exceeding ten years or beyond the period of expiration of the ward's minority, given by the Court of Wards under the sanction of the Board of Revenue.—(Act IV B.C. of 1870, s. 9.) (2) A lease given without such sanction by the Court of Wards or by the Collector acting for the Court or by the manager appointed by the Court for a term not exceeding ten years nor beyond the period of expiration of the ward's minority: provided that any such lease shall become null and void on the removal of the ward's estate from the superintedence of the Court of wards for any cause whatever.—(Act IV B. C. of 1870, s. 9.) (3) Leases for a period exceeding five years, made with an order of the Civil Court previously obtained, and leases for a period not exceeding five years made with or without such an order by the manager of the estate of a lunatic.—(Act XXXV of 1858, s. 14.) (4) Leases for a period exceeding five years, made with an order of the Civil Court previously obtained, and leases for a period not exceeding five years made with or without such an order by the manager of the estate of a minor.—(Act XL of 1858, s. 18.) (5) Leases of ghatwali lands in the district of Birbhum for periods extending beyond the lifetime or incumbency of the grantors and granted for the working of mines or for the clearing of jungle or for the erection of dwelling-houses or manufactories, or for tanks, canals and similar works, subject to this condition that every such lease be approved by the Commissioner of the Division by an endorsement on the lease under his signature.—(Act V of 1859, s. 1, proviso.)

(B) Freedom of Assent.—"Consent is said to be free when it is not caused by

(1) coercion as defined in s. 15, or

(2) undue influence as defined in s. 16, or

(3) fraud as defined in s. 17 or

(4) misrepresentation as defined in s. 18, or

(5) a mistake, subject to ss. 20, 21 and 22.

Consent is said to be caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake."—(Section 14 of the Indian Contract Act.)

(C). Lawfulness of the consideration or object :—"The consideration or object of an agreement is lawful, unless it is forbidden by law, or

is of such nature that, if permitted, it would defeat the provisions of any law, or is fraudulent, or

involves or implies injury to the person, or property of another. or

the Court regards it as immoral or opposed to public policy. In each of these cases the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful, is void."—(Section 23, Indian Contract Act.)

The contract need not be in writing.—It is not necessary to the validity of a contract creating the relation of landlord and tenant that such contract should be in writing, but where it has been reduced to writing, registration is necessary where the law requires it.

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II. Where the relation of landlord and tenant is reasonably implied by acts of the parties.

Nityanund *v.* Kishen Kishore (Sp. W. R., Act X, 82) is an extreme case where such relationship has ben inferred. "We think," observes Steer, J., in this case, "that though by the law of landlord and tenant as applied in England, a person who takes and cultivates the lands of another (there being no express permission to cultivate on the side of the landlord, nor any express condition to pay rent on the part of the cultivator) would not be allowed to be regarded as a tenant, but treated as a mere trespasser, the peculiar circumstances of this country preclude the applicability of the technical doctrine of the English law of landlord and tenant to such a case. Here it is a very usual thing for a man to squat on a piece of land, or to take into cultivation an unoccupied or waste piece of land. Tenancy in a great many districts in Bengal, commences in this way, and where it does so commence, it is presumed that the cultivator cultivates by the permission of the landlord, and is under obligation to his landlord to pay him a fair rent, when the latter may choose to demand it. Thus, the established usage of the country regards these parties as landlord and tenant, and unless the landlord chooses thus to treat him, the cultivator is not regarded, as he would be by the law as administered in England, as a trespasser but as a tenant, and he would be so, although he may never have expressly acknowledged the landlord's right, or entered into any express contract with him for the payment of rent. If he chooses to cultivate the zemindar's land and the zemindar lets him, there is an implied contract between them creating a relationship of landlord and tenant. Therefore we think that, under the cirumstances of the case, where the defendant avowedly holds and cultivates the plaintiff's lands, he is, by the universal custom of the country, the plaintiff's tenant and while so holding and cultivating, is bound to pay him a fair rent, and to give him a kabuliyat." So it has been held that parties in possession make themselves tenants by use and occupation, and may be sued for rent even though not registered by the zemindar.—(Ranee Lalan Mani *v.* Sonamani, 22 W. R., 334.) *A* by permitting *B* to build a *háut* on his land, impliedly admits him as his tenant, and can claim rent from him, but not a share of the profits.—(W. R., Sp.. 165.) A zemindar by taking the deposited rent of the plaintiff's purchased lands admits his status as purchaser from former raiyats.—(Gudadhur *v.* Khetra mohun, 7 W. R., 460.) A landlord by taking rent from a party and suing him for arrears of his predecessor's rent, acknowledges him as his tenant.—(Cazi Syed Mahomed Azmul *v.* Chundilal, 7 W. R., 250.) A party in possession, and receiving from the occupant raiyat the entire rent payable for the land, has a right to claim rent from the raiyat as his personal tenant apart from any title to the property.—(Bhyro Sing v. Raja Lelanund, 21 W.R., 153.)

Receipt of rent proves that relation.

In a suit for arrears of rent plaintiff must show that there was some contract to pay rent entered into by defendant. This may be shown either by the evidence of some specific contract, or by evidence of previous payment from whlch a contract could be inferred.—(Luchmeeput Doss *v.* Sheik Enyet Ali, 22 W. R. 346; Nityande Ghose *v.* Krishna Kisore, S.W. R., p. 1864, Act X

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1882.) In the course of the judgment in this case, Ainslie J. observed that although there may not have been specific contract to pay rent,still the plaintiff would be entitled to a fair compensation for use and occupation of land, but this will hardly help the plaintiff, because there is absolutely no evidence as to what would be a fair compensation for the land, except the evidence of previous payment of rent, which has been rejected as not trustworthy. Although the Court need not be strict to tie the plaintiff down to the exact form of his plaint, yet when he seeks to intrtoduce any change he must show that the view of matters which he now puts forward was one which has been really in the contemplation of the parties so that they had an opportunity of bringing forward evidence on the point, and that the evidence on the record was really directed to the substantial cause set up." Compare Lukheekanta Das *v.* Sumeeruddin Luskur, 21 W. R., 208, F. B.;—Lalamun *v.* Sonamun, 22 W. R. 334 Sournamaye *v* Dinanath Srie Sonyasi I. L. R., 9 Cal. 988. In another case it has been held by Phear., J, that, "the claim of the plaintiff to recover rent from the raiyat whom he sues must stand upon one or other of the two grounds, namely either the raiyat by payment of rent on previous occasions or otherwise has admitted himself to be bound to pay rent to the plaintiff personally or the plaintiff must show that he has come by purchase or some sufficient mode of transfer into the place of those persons who had previously the right to receive, and be paid the rent by defendant raiyat." Further on the learned Judge says that the party who has been in possession by receiving from the occupant-raiyat the entire rent payable in respect of the land, or by virtue of any acknowledgment from him that he was occupying the land as the said party's tenant at a definite rent, has a right to claim rent from the raiyat as his personal tenant apart from any title to the property on which he relies.—(Bhyro Sing *v.* Rajah Leelanand Singh Bahadur 21 W. R., 153.) A lessee may sue the under-tenants and recover rent from them without proof of his previous receipt of rent. He is entitled to a rent-decree if he can show that his lessor was in possession by receipt of rent. For his possession is in the eye of law a mere continuation of that of his lessor. A purchaser of a zemindari is entitled to all the rents accruing due from the date of his purchase; and if the tenants or raiyats, after having had notice of his title, choose to continue to pay their rents to, or for the use of, the former proprietor, they do so at their peril, and cannot plead such payments in answer to a suit for rent by the new owner. The notice may be either actual or symbolical, which last is usually given in this country by placing a bamboo on the land.—(The Collecter of Rajshahye *v.* Huro Sundari, Sp. W. R., Act X, 6.) A landlord who was registered as owner of the land in respect of which he claimed rent, sued the occupier for such rent, but was only able to prove the fact that he was the registered owner, and was unable to show that the relation of landlord and tenant existed, so that he had a good title to the estate of which he was the registered owner. It was held that the suit was rightly dismissed.—(Ramkisto *v.* Sheik Hurain, I. L. R., 9 Cal., 517.) The resumption by Government of invalid lakheraj land creates the relation of landlord and tenant between the zemindar and holder of such land.—(Huro Prosad *v.* Shyama Prosad,

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6 W. R., Act X, 107.) Similarly the decree of a competent Court finding that the defendant has no right to hold land as lakheraj creates this relation between him and the proprietor of the land.—Soudamini *v.* Surrup Chunder, 17 W. R., 363. A landowner who, after the expiration of a lease, continues to receive rent for a fresh period, and suffers the tenant to occupy, must be considered to have acquiesced in the tenant continuing to hold upon the terms of the original lease, *i.e.*, as tenant from year to year, and cannot turn out the tenant or treat him as a trespasser, without giving him a reasonable notice to quit.—(Ram Khelawan *v.* Musst. Soondra, 7 W. R., 152 ; Jumail Ali *v.* Chowdry Chutturdhare, 16 W.R., 185 ; C. G. D. Betts *v.* Jamie Sheik, 23 W. R., 271 ; Shadhoo Jha *v.* Bhupawan Upadhya, 5 W. R., Act X, 17 ; Ooma Lochan *v.* Nityechand, 14 W, R., 467.) But to justify a holding after the expiry of the lease. a direct consent on the part of the landlord is requisite ; otherwise the tenant will be regarded as a trespasser and be liable to damages.—(4 W. R., 4 ; Mr. M. H. Gale *v.* Maharani Sreemutty, 15, W. R., 133.) A condition in a lease allowing a tenant to hold on after expiry, till a new arrangement is made, does not entitle the tenant to claim a fresh arrangement with the zemindar direct.—(1 W. R., 250.) A tenant, who holds over after the expiration of a lease, does so on the same rent and terms as before, until a fresh settlement is come to.—(Sheik Enayutullah *v.* Sheik Eleheebuksh, Sp. W. R., Act X, 42 ; Tara Chandra *v.* Ameer Mundle 22 W. R., 394.) Where a tenant who has a lease for one year holds over after the expiry of his lease, and is not in the position of a trespasser, it must be presumed that he has continued to hold on the same terms as those on which he held in the first year of his term.—(Srimati Altab Bibi *v.* Joogul Mundle, 25 W. R., 224 ; Saheo Sahai *v.* Bechan 22 W. R., 31.) See notes under s. 51, p. 225, *ante*. If a tenant encroaches, the presumption is that he does so for the benefit of the landlord.—2 Hay's Reports, 560.) see p. 232 *ante*. But a tenant's mere statement or willngness to pay rent is not sufficient to constitute the relation of landlord and tenant.—(Messrs. T. Lyons and others *v.* M. C. G. D. Betts, 13 W. R., 94.) Where the plaintiff and defendant both held pottas from the same zemindars, but plaintiff's potta, which is of a later date, is for a *moorfut*, which includes the land for which the defendant holds a lease, plaintiff's lease does not make him defendant's landlord.—(Kalam *v.* Panchu, 11 W. R., 128 ; 3 B. L. R., A. C. 253.) An alluvial formation accreted to a raiyat's jote and the proprietary right in the accretion was claimed by the Goverment on one hand and the neighbouring zemindar on the other. The raiyat held his jote under Goverment, but wishing apparently to make sure of the land whichever way matters turn out, he sued the landlord for a potta. The Court, however, held that the suit was not maintainable. "Section 2 of Act X of 1859." observed Peacock, C. J., "enacts that every raiyat shall be entitled to receive a potta from the person to whom the rent of land held or cultivated by him is payable. In this case the rent of the jote is payable to Goverment and as the accretion was to the jote, the plaintiff has no right to demand a potta from the zemindar or his ijaradar. He is not the raiyat of the zeminder or his

Holding on after the lease.

Encroachment by the tenant.

Where the relation is not made out by implied conduct.

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ijaradar, for is rent payable by him to the zemindar or his ijaradar nor accretion."—Campbell *v.* Krishna Dhun, Marsh.'s Reports, 67.

III. Where the relation has been created or continued by the operation of law or by change of parties.

By operation of law.

As, for instance, when the landlord sues a trespasser in the alternative under s. 157 of the Bengal Tenancy Act. So it has been held that a decree of a Civil Court in a suit (the plaint of which referred to s. 30 of Reg. II of 1819, and s. 10 of Reg. XIX of 1793) which declared the right of the zemindars to assess rent on land not proved to have been held under a grant prior to 1st December 1790, is sufficient to establish the relation of landlord and tenant between the zemindars and the party against whom the right of assessment was declared.—(Srimati Soudamini *v.* Sarup Chunder, 8 B. L. R., App., 82; 17 W. R., 363.) But a different view has also been taken. Where the lands in question had been declared in a previous litigation between the parties to be *mal* lands of the plaintiff's zemindari, wrongfully held by the defendant under an invalid lakheraj title, it was held that such fact was not sufficient to convert the defendant into a tenant of the plaintiff.—(Soudamini *v.* Mohesh, 19 W. R., 262.) Under the provisions of Reg. V of 1799, s. 5, and Reg. V of 1827, s. 3, the Collector took charge of a sub-tenure as administrator of a deceased person to whom the sub-tenure belonged; it was held he was in no sense the tenant of the superior landlord, and consequently no suit for rent will lie against him.—(Collector of Bogra *v.* Dwarkanath, 4 B. L. R., App., 80; 13 W. R., 194.) Where a putnidar and his tenants were defendants in a suit brought by the zemindar for setting aside the putni, and both were by decree made liable for the mesne profits which the tenant eventually paid out of his own pocket, it was held that the effect was to cancel all relation of landlord and tenant between the putnidar and his tenant, and to give the tenant a right to receive back what he had paid.—(Rakhal Moni *v.* Brajendra, 23 W. R., 303.) Where *A* holds under *B's* tenant, his possession is not adverse to *B*, and if he continues to hold, the presumption is that he holds as before. If setting up a title to any portion of a property, he obtains a decree against *B's* alleged tenant, this will give a cause of action against *A*.—(Bungsaraj *v.* Mohunt Lal, 20 W. R., 395.)

IV. By change of parties—See ss. 72 and 73 of the Act. The relation of landlord and tenant continues even when the interest of the former is transferred by private sale, gift or otherwise or by an execution-sale or by the operation of the laws of inheritance or will, or by a revenue sale,—where the purchaser has no legal power to avoid the tenant's interest, or having such power does not elect to exercise it. The law on this point has been laid down by s. 109 of the Transfer of Property Act: "If the lessor transfers the property leased, or any part thereof, or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights and, if the lessee so elects, be subject to all the liabilities of the lessor as to the property or part

Reg. XVIII of 1812, s. 3, cl. 2.

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transferred so long as he is the owner of it; but the lessor shall not, by reason only of such transfer, cease to be subject to any of the liabilities imposed upon him by the lease, unless the lessee elects to treat the transferee as the person liable to him." There may not be an express agreement between the parties to pay rent: and where a party occupies land within a zemindari as a tenant-at-will on term of paying rent, a purchaser of the zemindari would have a right after his purchase to treat him as a tenant.—(Guru Prossunna v. Sree Gopal, 20 W. R., 99.) A purchaser of land is bound by a contract between his vendor and a tenant, which is secured by the rent of the land remaining in the hands of such tenant, the contract being in the nature of an assessment of rent of the property sold.—(Churaman *v.* Musst. Patoo Keor, 24 W. R., 68.) So the relation of landlord and tenant continues when the latter is a permanent tenure-holder or fixed raiyat, and his interest is transferred by sale, gift, or mortgage (ss. 12 and 18 of this Act), or by an execution-sale (ss. 13, 14 and 18), or by summary sale under any law relating to putni or other tenures (s. 8, cl. 1 of Reg. VIII of 1819, s. 105 of Act X of 1859; s. 4 of Act VIII, of 1865, B. C.; s. 159 of this Act), or by the laws of succession (ss. 15 and 18 of the Act); so the relation continues when the tenant is an occupancy-raiyat, and his interest is transferred by devolution or death (s. 23 of the Act), or by execution-sale for arrears of rent (s. 159), or by sale, gift or otherwise where his holding is transferable by usage (s. 183, illustration (I)), or where his interest is transferred by an execution-sale for money-decree or by grants, sale gift or otherwise with the consent of his landlord. Receipt of rent from the transferee has been held to be equivalent to such consent. A zemindar may recognize a transfer by receiving rent from the transferee.—(Nobo Koomar *v.* Kishen Chunder, Sp. W. R., Act X, 112; Dwarkanath *v.* Allendi, 15 W. R., 320; Dhunput *v.* Velleyet Al, id., 211; Anundmayi *v.* Mohendranarain, id., 264; Hanooman *v.* Musst. Koomerunnessa, 1 Hay, 266; Meah Jan *v.* Karunamayi 8 B. L. R., 1.)

Recognition of the transferee as tenant.

A zemindar may by accepting rent assent to a transfer which involves a sub-division of a tenure.—(Bharut Chander v, Ganganarain, 14 W. R., 211.) The mere cognizance or supposed cognizance by a zemindar of the fact of a party having purchased a tenure is not sufficient to cure the defect of non-registration. It must be shown that the zemindar has not only known of the transfer, but has accepted the transferee as his tenant.—(Sarkies *v.* Kali Kumar, Sp. W. R., Act X, 98.) Where a zemindar takes rent from a party as holder of a tenure, he cannot afterwards draw back and ignore the position of such party, even although the latter may not have been registered in his office.—(Mirtunjoy *v.* Gopal Chunder, 10 W. R., 466; 2B. L. R., A. C., 131.) So again a landlord by having allowed the sums paid into the Collectorate by a third party to be carried to his credit, was held to have clearly recognized the transfer from the tenant to the third party, although such transfer had not been registered.—(Ramgobindo v. Doshobhooja, 18 W. R., 195.) In the same way where a landlord in executing a decree for rent, sold his raiyat's tenure, he cannot proceed against the old tenant for arrears of rent; but he must proceed against the execution-purchaser, notwithstanding the non-registration of the purchase in his sherista.—(Prosunnomoyi

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v. Bhubotarini, 10 W. R., 494 ; Gopee Kristo *v.* Ram Kumar, Marsh., 213.) But the payment of rent to the gomasta for over two years without communicating the fact of purchase lo the zemindar was held not to amount to a recognition of such transfer by the zeminder.—(Brojo Bihari v Aka Golam, 16 W. R., 97.)

V.—Determination of the relation of landlord and tenant

Section 111 of the Transfer of Property Act gives the law on this point succinctly: "A lease of an immovable property determines—

(*a*) by efflux of the time limited thereby:

(*b*) where such time is limited conditionally on the happening of some event—by the happening of such event:

(*c*) where the interest of the lessor in the property terminates on, or his power to dispose of the same extends only to, the happening of any event—by the happening of such event:

(*d*) in case the interest of the lessor and the lessee in the whole of the property become vested at the same time in one person in the same right:

(*e*) by express surrender; that is to say, in case the lessee yields up his interest under the lease to the lessor, by mutual-agreement between them:

(*f*) by implied surrender:

(*g*) by forfeiture; that is to say, (1) in case the lessee breaks up an express condition which provides that on breach thereof, the lessor may re-enter, or the lease shall become void; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself, and in either case the lessor or his transferee does some act showing his intention to determine the lease:

(*h*) on the expiration of a notice to determine the lease, or to quit, or of intention to quit, the property leased, duly given by one party to the other.

(*a*)—To the first of these the corresponding section of the Bengal Tenancy Act is s. 44, cl. (c), limited by s. 45, which apply to a non-occupancy-right, bnt there is no corresponding provision for tenure-holder and necessarily none for permanent tenure-holder, fixed raiyat or occupancy-raiyat, who cannot be ejected on this ground at all.

(*b*)—To the 2nd corresponds s. 44, cl. (*a*), limited by s. 46, of this Act.

(*c*)—As, for instance, by sale of the estate or tenure for its own arrears of revenue or rent, where the purchaser elects to determine the tenancy.—(Act XI of 1859, ss. 52 and 53 ; Act VII, B. C. of 1855, s. 12 ; Reg. VIII of 1879, s. 8, cl. 1, and s. 11, cl, 2 ; Act VIII of 1859, B. C., ss. 66 and 59 ; Act VIII of 1865, ss. 16, 4.) There are execptions to these.—(Act XI of 1859, s. 51, Act VII, B. C. of 1868, s. 12, see the Appendix.) The corresponding sections are ss. 159, 160 and 161 of this Act. So it has been held that where the lessor's interest terminates the lessee must also go out.—(Hurish Chunder *v.* Sree Kail, 22 W. R., 274 ; Marsh., 166.) But where the relation is once admitted, it continues, and mere non-payment of rent does not determine the tenancy.

Non-payment of rent does not determine the tenancy.

(*d*)—we have a similar provision in s. 22 of this Act.

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(*e*)—corresponds to s, 86 of this Act.

(*f*)—corresponds to s. 87.

(*g*)—(1) *Breach of Condition.*—We have corresponding provisions in ss. 10 and 18 (with respect to a permanent tenure-holder and fixed raiyat), in s. 25 (with respect to an occupancy-raiyat), and s. 44, cls. *a* and *b* (with respect to a non-occupancy-raiyat).

(*g*)—(2) *Disclaimer* see pp. 142—145 and 191 *ante*. It may, however, be argued that it is only when a plaintiff seeks to eject tenant under s. 155 or s. 157 of the Bengal Tenancy Act that the law of forfeiture will not apply, but when he seeks to recover possession of the land by establishing his right to it, there is not reason why the tenant who has denied the title of his landlord should be allowed to fall back upon a status which he does not recognise, and which his landlord, upon his denial of his right, repudiates. With reference to holders of a non-agicultural holding as for instance the holder of a homestead or *sursory* tenure-holder, s: 111 . cl 9, the Transfer of Property Act, will prevail. (See ss 112 and 117 of that Act).

(*h*)—We have a corresponding provision in s. 45 of the Bengal Tenancy Act.

The landlord is bound to give and maintain peaceful possession.—But the relation will not exist between a raiyat and a zemindar until the former has obtained possession.—(Bharut Chunder *v.* Oseemuddin, 6. W. R., Act X, 56). Delivery of possession being a condition necessary for the maintenance of an action of rent, it is necessary for the landlord to show that the tenant was able to receive possession. —(Hurish Chunder *v.* Mohini Mohan, 9 W. R., 582; Buller *v.* Lalit Jha, 3 B. L R., App. 119). In every agreement to have land, there is an implied contract that the lessors will give peaceful possession of the land leased to the lessee—(Munee Dutt *v.* Campbell, 11 W. R., 278). It is not necessary for the lessee to apply to the lessor to be put in possession—(Munee Dutt *v.* Campbell in review, 12 W. R., 149; Radhanath *v.* Jai Sundur, 2 C. L. R., 302). The landlord is bound to do something more than merely sign the lease and then say he is entitled to the rent. He is bound to put the tenant into possession of the land or secure him quiet enjoyment thereof.—Krista Sundur *v.* Kumar Chunder Nath, 15 W. R., 230. Unless and until he does so, he is not entitled to the rent.—Shama Prosad *v.* Taki Mullek, 5 C.W. N. 816. A covenant for quiet enjoyment runs with the land.—Lewis *v.* campbell, 8 Tenant (1819), 715; Campbell *v.* Lewis (1820), 3 B and Ald., 392. A covenant is said to run with the land when either the liability to perform it, or the right to take advantage of it. passes to the assignee of the land—Woodfall (16th Ed), 172. See, however, section 108 of the Transfer of Property Act which runs thus:—" In the absence of a contract or local usage to the contrary, the lessor and the lessee of immoveable property as against one another respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased:—(*a*) The lessor is bound to disclose to the lessee any material defect in the property, with reference to its intended use, of which the former is, and the latter is not aware, and which the latter could not with ordinary

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care discover; (*b*) The lessor is bound on the lessee's request to put him in possession of the property; (*c*) The lessor shall be deemed to contract with the lessee that, if the latter pays the rent reserved by the lease and performs the contracts binding on the lessee, he may hold the property during the time limited by the lease without interruption. The benefit of such contract shall be annexed to and go with the lessee's interest as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested; (*n*) If the lessee becomes aware of any proceeding to recover the property or any part thereof, or of any encroachment made upon, or any interference with the lessor's rights concerning such property he is bound to give, with reasonable diligence, notice thereof to the lessor." A landlord is further bound to maintain his tenant in possession, and he is not entitled to recover rent, if the tenant is interrupted or disturbed by him or by any person claiming through him, or paramount to him. Thus by granting a later lease he makes himself responsible for any loss that may be occasioned to the tenant in possession under a prior lease.—(Gobind Chand *v.* Mun Mohan, 14 W. R., 43). So when he interferes with the possession of his tenant by inducing his under-tenants to pay rent to him, his interference amounts to dispossession.—(Hoymobuty *v.* Sri Krishna, 14 W. R., 58; Kadumbini *v.* Kashee Nath, 13 W. R., 338); or if he takes, possession by a seezwal.—(Donzelle *v.* Gridhari Sing, 23 W. R., 121). Eviction by title paramount to that of the lessor is a good answer in suit for arrears of rent. "According to the English Law, 'if the lands demised be evicted from the tenant, or recovered by a title paramount, the lessee is discharged from the payment of the rent from the time of such eviction,' and if he is evicted from part the rent is to be diminished in proportion to the land evicted. It is laid down in Bacon's Abridgment. Tit. Rent (*m*) where a lessor enters forcibly into part of the land, there are variety of opinions whether the entire rent shall not be suspended during the continuance of such tortious entry, and it seems to be the better opinion and the settled law at this day, that the tenant is discharged from the payment of the whole rent till he be restored to the whole poseession, that no man may be encouraged to injure or disturb the tenant in his possession, whom by the policy of the law he ought to protect and defend, and it has been held that when a lessee is evicted by title paramount to that of his lessor, an apportionment of rent may take place in an action brought for the rent. It appears to me that the *onus* is on the lessor, or who claims to be entitled to an apportionment to show what is the fair rate of the lands out of which the tenant was not evicted.—(*Per* Peacock, C. J., Gopanand *v.* Lalla Gobind Pershad 12 W. R., 109; Brajanath *v.* Hiralal, 1 B. L. R., A. C. 87, 10 W. R., 120). If the interference be in respect of only a portion of the property, there should be no apportionment of the rent, the whole rent being equally chargeable upon every part of the land.—Hurro Kumari *v.* Purna Chandra, I. L. R., 28 Cal., 188. But if the tenant is disturbed by the wrongful act of a stranger, the landlord's right to receive rent is not affected. The tenant may proceed against the trespasser under law—(Gobind Chunder *v.* Krishna Kant, 14 W. R., 273; Donzelle *v.* Gourdhari, 23 W. R., 121.) The right to rent, however, ceases if the

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tenant is dispossessed by a stranger who has a good title, the lessor having none. This principle is recognised in Runglal *v.* Lalla Rudur Pershad, 17 W. R., 386.

It is not only actual eviction of the tenant which suspends his liability to pay rent; any act of the landlord substantially interfering with the enjoyment of the demised property would entitle the tenant to a suspension of the rent during such interference, even though there can not be actual eviction—Dhanputi Sing *v.* Mahomed Kazim Ispahain, I. L. R., 24 Cal., 296; nor, in order to disentitle the landlord from claiming or recovering rent, is it necessary that there should be a complete eviction: wilful disturbance of the lessee's quiet possession and enjoyment is a sufficient disentitling cause—Rani Lalita Sundari *v.* Rani Surnamayee Dasee, 5 C. W, N., 353. In one case, however, it was held that when the superior holders of a tenure over the plaintiff compelled his tenants to attorn to them and pay rent accordingly it was not an ouster in law of the plaintiff, and that the plaintiff was entitled to a decree for rent against the defendants, who were said to have a cause of action for damages against the superior holders of the tenure.—Chundernath *v.* Jugut Chunder, 22 W. R., 337. The correctness of this decision, however, is doubtful. Mere discontinuance of rent by the raiyats does not amount to dispossession—Tarini Mohan *v.* Gunga Prasad, I. L. R., 14 Cal,, 649. But if the raiyats withhold rent at the instance of the landlord, it is a disturbance of the quiet possession of the tenant. In a suit for rent where the tenant defendant alleges that he has not been put in possession of the entire land demised, the *onus* is on the tenant especially where rent has been paid for a number of years under the lease. —Beni Madhub *v.* Sridhur Deb, I. L. R., 10 C. L. R., 555. Where a lease purports to grant a larger interest than the lessor possesses, it is only invalid or void to that extent and no more. If a tenant were to create a lease extending beyond his term, the lease would take effect only for the term and not beyond. Should he, however, acquire a larger interest during the subsistence of the lease, the lease would extend to that interest.—Hurish Chunder v. Sreekali Mukherji, 22 W. R., 274; Sarat Sundari *v* Binny, 25 W. R., 347; Modhu Sudan v. Rooke, 1 C. W. N., 433; I. L. R., 25 Cal., 1; L. R., 24 I. A. 164. A Hindu widow who is in possession of her deceased husband's estate, cannot grant a patni unless for a necessity recognised by the Hindu Law. If it were created without any such necessity the patni would only be voidable, not void; as the reversioner might elect to assent to it and treat it as valid. —Modhu Sudan v. Rooke, supra. Although there may not be an eviction in the proper sense of the word, when the lessee brings a suit for possession of the lands demised and obtains a decree only for a part, the result of which is to preclude him from getting a substantial part, his position is the same as if he had been evicted. He therefore, has the same equity for an apportionment as if he had been evicted.—Imambundi Begum v. Kumlesswri Peshad, I. L. R., 21 Cal., 1005.

Tenant cannot deny landlord's title:—The principle is "once a tenant, always a tenant." This has been enunciated and embodied in section 110 of the Indian Evidence Act which runs thus: "No tenant of immoveable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be

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permitted to deny that the landlord of such tenant had, at the beginning of the tenancy a title to such immoveable property, and no person who came upon any immoveable property by the license of the person in possession there of, *shall* be permitied to deny that such persons had a title to such possession at the time when such license was given." See Joynarain Bosu v. Kadambine Dasi; 7 B. L. R., 353; and Taylor on Evidence, sections 88-9. But where A had executed a kabuliyut to B, the zemindar, and B. subsequently granted a putni lease to C, who sued A for rent upon the kabuliyut executed in favour of A, A admitted the execution of the kabuliyut but pleaded that B was only a benamidar for her husband; it was held that it was open to A to prove his plea.—Donzell *v.* Kedarnath, 7 B. L. R., 720, 721 *note*; 20 W. R., 352. Bhyro Singh v. Lelanund Singh, 21 W. R., 153; Sonamairs Bibi v. Dhan Munshi, 1 C. W. N., xxiv. So a tenant who pays rent to a person and believing him to be the landlord's representative, is not estopped from showing the want of title in that person.—(Banhe Madhub v. Thakur Das, B. L. R., F. B., 588 6 W. R., Act X, R. B., 71). The learned Chief Justice observed in this case:—"But even if the widow had been in receipt of her husband's share of rent, that is to say, if after her husband's death the tenant had paid rent to her speaking for myself alone, I should have been of opinion that neither she nor her grantee would be entitled in this suit to recover the rent after the will of her husband was established and her title disproved. According to English Law, if a man takes land from another as his tenant, he is estopped from denying the title of that person. But if he takes land from one person and afterwards pays rent to another, believing that other to be the representative of the person from whom he took the land, he is not estopped, in a suit for rent subsequently becoming due, from proving that the person to whom he so paid rent was not the legal representative of the person from whom he took. For example, if a man pays rent to another, believing him to be the heir-at-law of his deceased landlord, and afterwards discovers that he is not the heir-at-law or that the landlord left a will, the tenant in a suit for subsequent arrears of rent, would not be estopped from showing that he paid the former arrears under a mistake, and that the person to whom he so paid had no title. The admission of a man's representative character by payment of rent to him is not conclusive, although it may amount to *primâ-facie* evidence. It is like all *primâ facie* evidence, liable to be rebutted and the tenant is not estopped from rebutting it, if he can." So in Ranee Tilleswari v. Rani Ashmed, 24 W. R., 101, the Court remarked: "It has been said that the plaintiff has already recovered a decree for rent against the ancestor of the defendant for a previous year, and he is therefore estopped from denying the title of the plaintiff who has thus become his zemindar. This contention is not correct. If the tenant had been installed in possession by the plaintiff, *i. e.*, if his tenancy had been created by her, no doubt if he would not have been competent to question the title of the alleged assignee of his admitted landlord, and I do not know of any principle of law which prevents him from doing so." So a receipt of rent in which the zemindar styled himself "Zemindar of 4 annans" but which showed

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that the raiyat did not pay the zemindar the full 4 annas' share of rent was held not to estop the raiyat from questioning the landlord's title—(25 W. R., 69.) Section 116 of the Evidence Act shows that though the tenant is not permitted, *during the continuance of his tenancy*, to deny that the landlord had *at the beginnig of his tenancy*, he is at liberty to prove that such title has ceased to exist—(Burne and Co. v. Rashamayi, 14 W. R., 85; Gopanand *v.* Gobinda Prosad, 12 W. R., 109; Mohun Mahla v. Meer Shamsul Huda, 21 W. R., 5; Amner v. Ram Krishna, I. L. R., 2 Mad., 264; Vedu v. Nilkantha, I. L. R, 22 Bom. 420). or that his landlord had no title *before* the commencement of the tenancy where the tenant was in possession before, and he give a kabuliyat to a person claiming a derivative title from the last owner, he is not estopped from disputing the title of that person. The Court observed: "The words 'at the beginning of the tenancy' in that section can only apply to cases in which the tenants are put into possession of the tenancy by the person to whom they have attorned, and not a to case like the present, where the tenants have previously been in possession. Possession in this case was really from the raiyat defendant to the plaintiff, and not from the plaintiff to the defendant. Further it cannot be said that there was any such contract between the parties as would estop the defendant from denying the plaintiff's title inasmuch as no consideration was given. Had the plaintiff inducted the defendant into possession, the giving of possession would have been the consideration, but the defendant was in possession before, and all that he did was to give a kabuliyut to a person claiming derivative title from the last owner. This title the defendant now wishes to dispute, and we think that he is entitled to do so"—(Lal Mahomed v. Kallanis, I. L. R., 11 Cal., 519). See also Cornish v. Scarell, 8 B. and C, 471; Hall v. Butler 10 A. and E, 204; Brojonath Chowdhuri v. Lall Meah, 14 W. R., 391; Jasingbhai v. Hatji, I. L. R., 4 Bom., 79. But if the new landlord does not claim through any derivative title from the former owner, but sues upon a kabuliyat executed by the tenant in possession, will this decision apply? I think it will, because the words 'at the beginning of the tenancy' means the beginning of the tenant's tenancy, and not the introduction of a new landlord." The admission in the kabuliyat will then operate as an admission but not as estoppel. In a suit to eject a tenant holding over after the expiration of the lease, it is not competent to the tenant to set up that his landlord, the plaintiff, holds under an invalid lakheraj, and that the zemindar, and not the plaintiff, is entitled to the land.—(2 Hay, 473; Marshall, 377). Similarly a person who pays rent to another believing him to be the landlord's representative, is not estopped from afterwards showing the want of title in that other.—Beni Madhub v. Jhakurdas B. L. R., 7 B. 538; 6 W. R., Act X, 71; Gouri Das v Jugornath, 7 W. R., 25. A tenat is not precluded from questioning the title of the assignee of his admitted landlord.—Tillesvari Koer v. Asmedh Koer, 24 W. R., 101 When the ostensible landlord is not the real lessor and beneficially entitled to the rent, but is only a benamidar for a third party, the tenant is competent to deny his lessor's title.—(Donzelle v.

Derivative title.

Benamidar.

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Kedarnath, 7 B. L. R., 720; 16 W. R., 186; 20 W. R., 352; 24 W. R., 44.)—Kadurnath *v.* Donzlle 26 W. R., 352; Musst. Indurbutti Koer *v.* Shaik. Muhbub Aly, 24 W. R., 44; Kailas Mundle *v.* Burada Sundari, I. L. R., 24 Cal. 711.

Possession of tenant not adverse to his landlord:—Another well recognised principle of law is that the possession of a tenant is not adverse to his landlord.—Shirsteedhur Mozoomdar v. Kali Kant 1 W. R, 171; Watson & Co. *v.* Shurut Soondaree Dbi 7 W. R., 395; Davis *v.* Kazee Abdll Hamed 8 W. R., 55; Grish Chunder Roy *v.* Bhugwan Chundr Roy 13 W. R., 191; Lakhoo Khan *v.* Wise 18 W. R., 443; Baboo Doolee Chund *v.* Sham Beharee Singh 24 W. R., 113; Haradhun Roy *v.* Hulodhur Chunder Chowdhroy 25 W. R., 56; Raj Kishore Surma Chuckerbuty *v.* Grija Kant Lahiree 25 W. R., 66. Where the relationship of landlord and tenant has once been proved to exist, the principle of once a tenant, always a tenant' will apply, and the tenant will not be allowed to set up an adverse right. The mere non-payment of rent, though for many years, is not sufficient to show that the relationship has ceased and a tenant who is sued for rent and contends that such relationship his ceased, is bound to prove that fact by some affirmative proof, and more specially is he so bound when he does not expressly deny that he still continues to hold the land in question in the suit.—(Rungalal *v.* Abdul Guffur, I. L. R., 4 Cal., 314; Poreshnarain v. Kashi Chunder, I. L. R., 4 Cal., 661; Grish Chunder *v.* Bhugwan Chunder, 13, W. R., 191; Trailokya v. Mohim Chunder, 7 W. R., 460.) So where A holds under B's tenant his possession is not adverse to B, and if he continues to hold, the presumption is that he holds as before.—(Bungsraj v. Mohun Meghlal, 20 W. R., 398.) But should A set up a title to any portion of the property and obtian a decree against *B's* alleged tenant, that would give *B* a cause of action against *A*.—(*Ibid.*) The principle applies so long as there is no dispute or confliting claim.—Ram Chunder *v.* Madha Kamari I. L. R,, 12 Cal., 481 P. C. Similarly if the tenant openly sets up an adverse title and holds adversely, limitation runs.—(Hurnath v. Jogendra Chunder, 6 W. R., 218; Nujimuddin v. Lloyd, 15 W. R., 232; 12 W. R., P. C., 6; Tikaitnu Gouru Coomaru *v.* Bengal Coal Co., 13 W., R., 129; Tikaitnu Gouru Cumaru *v.* Saroo Cumaru, 19 W. R., 52; Pitamber Babu *v.* Nilmani Sing Deo I. L. R. 3, Cal. 793. Gopal Rao *v.* Mahadeo Tao, I. L. R., 21 Bom., 394; Gossain Dalman Puri *v.* Bipin Behari, I. L. R., 18 Cal., 520), In a suit for possession of land brought against a tenant who is really a trespasser, the defendant, by merely alleging tenancy in his written statement, does not preclude himself from pleading limitation.—(Dinamayi *v.* Durga Prasad, 21 W. R., F. B., 70, overruling 7 W. R., 395.) But in a suit for possession, where the defendant admits tenancy and there is no finding to the contrary, the Court cannot regard his possession as adverse, and apply the law of limitation, even if the plaintiff has not had khas possession for twelve years.—(Doolee Chand *v.* Sham Bihari, 24 W. R., 113; Haradhon v. Hulodhur, 25 W. R., 56; Rajkishore v. Girijakant, 25 W. R., 66; Lakhu Khan v. Wise, 18 W. R., 443; Grish Chunder v. Bhugwan, 13 W. R., 191; I. L. R., 4 Cal., 327; 7 W. R., 395.)

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Forfeiture of rights by denial of landlord's title:—The doctrine of disclaimer has been discussed at pp. 142-145 and 191.

Benami-holder:—In a suit for arrears of rent, in which an intervenor alleging that the plaintiff was merely his benamider was added as a defendant under the Code of Civil Procedure, s. 72, it was held that it was wrong to introduce him into the case, and that any issue as to the alleged benami was foreign to the suit.—(Rughoonath Prosad *v.* Byjnath, 24 W. R., 349.) Plaintiff who derived title from *A*, who was the ostensible purchaser of certain immoveable property at an auction-sale in execution of a decree against *B*, brought a suit to recover the rent of such property from the talukdars. The appellant was allowed to intervene alleging that *A* was the benamidar of a third person from whom he himself had purchased the property. The lower Courts, however, refused to try the question of benami as not being admissible in a rent-suit. On appeal, *held*, that the question of benami was properly raised in the suit and ought to have been tried.—(Tarini Kant *v.* Krishna Moni, 5 C. L. R., 179.) The Court distinguished this case from the former thus: "Here there is no question as between the benamidar and the beneficial owner, *i.e.*, between Gagan Chunder as benamidar and Goluk Nath as beneficial owner. It is admitted that Gagan Chunder, although the recognized purchaser of Bisvanath's interest at the execution-sale, never exercised proprietory rights by collecting rent, &c. Consequently as between the plaintiff, who derive from Gagan Chunder, and the intervenor-defendant, who derive from Goluk Nath Chowdhry, the question is fairly raised and ought to be determined, namely, which of the two is entitled to the rent. If the lower Court thought that this question of title could not be raised in a rent-suit it ought not to have admitted the intervenor-defendant as a party to the suit, but having admitted him it ought not to have tried the issue which he raised." *T* sued for arrears of rent on a specific share of a tenure. *G* intervened, denying *T's* right and title, and claiming the right to receive the rent claimed as against T: *Held* that the question of title having been determined, *G* could not sue to re-open the same matter.—(Gobind Chunder *v.* Taruk Chunder, 1 C. L. R., 35.) In a suit for rent, where the defendant alleged that a person, not on the record, had a joint interest with the plaintiff in the property in respect of which the rent was due, it was held that, if the plaintiff disputed this and objected to such course being taken, it was improper to add such person as co-plaintiff, and that, if added at all, he should be a defendant, in order that the issue between him and the plaintiff might be properly tried; and also that in such case an appeal lies under s. 591 of the Civil Procedure Code.—(Goghe Sahoo *v.* Premlal Sahoo, I. L. R, 7 Cal., 148.) A landlord cannot hold both the nominal lessee and the benamidar liable for rent, but must make his election. "If he proves that the person in whose name the lease was taken was simply an agent for another, he can proceed against that other, unless he elects to sue the agent on his written contract in which case he cannot go against the principal.' (Sheik Kamyab *v.* Musst. Omda Begum, Act X, 88). The same view seems to have been maintained in Prosunna Kumar v. Kailas Chunder, 8 W. R., 428: F. B.,

In benami lease or transfers, the landlord may sue the real tenant.

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The question is in fact a question of undisclosed principal; and the following sections of the Indian Contract Act will throw some light upon it: "In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by himself on behalf of his principal, nor is he personally bound by them: such a contract shall be presumed to exist in the following cases: (1) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad; (2) where the agent does not disclose the name of his principal; (3) where the principal, though disclosed, cannot be sued." (s. 230.) "If an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract; but other contracting party has, as against the principal, the same rights as he would have had as against the agent if the agent had been the principal. If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfil the contract if he can show that, if he had known who was the principal to the contract, or if he had known that the agent was not a principal, he would not have entered into the contract." (s. 231.) "Where one man makes a contract with another, neither knowing nor having reasonable ground to suspect that the other is an agent, the principal, if he requires the performance of the contract, can only obtain such performance subject to the rights and obligations subsisting between the agent and the other party to the contract (s. 232). "In cases where the agent is personally liable, a person dealing with him may hold either him or his principal or both of them liable." (s. 233.)

A registered owner under Act VII of 1876 (B. C.):—See notes under s. 60 *ante*, pp. 256-58.

Onus probandi.—When once it is established that the persons at one time stood to each other in the relationship of landlord and tenant, or had been acting towards each other as such, the burden of showing that the relationship has ceased is on the person affirming it.—Section 109 of the Evidence Act (Act 1 of 1872); see also Ameer Ali and Woodroffe's Commentary on the Evidence Act, 2nd Ed., p. 746; and Mohun Mahtoo *v.* Meer Shumsool Huda 21 W. R., 5; Rungo Lall Mundul, *v.* Abdool Guffoor I. L. R., 4 Cal., 314, supra; and Parbutti Dassi *v.* Ram Chand Bhuttacharjee 3 Cal. L. R., 576. But where the tenancy is not admitted, and it has not been shown that the parties at any time stood to each other in the relationship of landlord and tenant, the burden of proving an alleged tenancy is on the party asserting it to exist.—Rammoni Mohurir *v.* Aleemuddeen 20 W. R., 374; Batai Ahir *v.* Bhuggobutty Koer 11 C. L. R., 476. Where, in a suit for rent or recovery of possession or enhancement, the defendant sets up a rent-free title, the determination of the question at issue will depend on the particular facts of the case.—Guman Kazi *v.* Harihur Mukerji W. R., Special No.. F. B., 115; Matungini Debi, *v.* Mohammed, W. R., Special No., Act X, 30; Bissessur Chuckerbutty *v.* Wooma Churn Roy 7 W. R. 44: Purseeh Narain Singh *v.* Bissessur

When relationship of landlord and tenant has existed.

When that relationship is not shown to have existed.

When defendant sets up a rent-free title;

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Dyal Singh 7 W. R., 148: prodhan Gopal Singh *v.* Bhoop Roy Ojha 9 W. R. 570; Raj Kishore Mookerjee *v.* Hurephur Mookerjee 10 W. R. 17. Prem Chand Barik v. Brojo Nath Koondoo 10 W. R. 204, Harihur Mookhopadhya *v.* Madub Chander Babu 8 B. L. R., 566. 14 Moore's. I. A, 152; Arfun Nissa v. Peari Mohun Mukerjee I. L. R., 1 Cal. 378. in a suit for resumption of lands where the defendants allege that the lands are lakheraj, the onus is on the plaintiff in the first instance, to show that the lands are mâl, and if he fails to make out a *primâ facie* case, the suit should be dismissed—Narendra Narain *v.* Bishnu Chander, I. L. R, 12. Cal. 182. Where the title of landlord is admitted in respect of a portion of the land in dispute,, it was said that it lay on the defendant to prove his plea of not being the plaintiff's raiyat as to the rest. In Gooroo Prosad *v.* Juggobundoo, W. R., Sp. No. 1 F. B., 15, which was a suit for assessment at enhanced rates, and not for resumption and in which the defendant admitted that the main portion of the lands in dispute was rent-paying but alleged that another portion was rent-free, it was *held* that the plaintiff was not bound to prove that the lands were rent-paying until the defendant pointed out their precise situation.—Sotto Churn *v.* Mohesh Chunder 3 W. R., 178. It was further held that where the defendant admits a tenacy for one portion of the land for which rent is sought, he must give some *primâ facie* proof of an ostensible rent-free holding to bar a plaintiff in a suit for enhanced rent.—Ashrufoonnissa *v.* Umung Mohan, 5 W. R., Act X, 48; see also Huree Mohun *v.* Gureeboollah 22 W. R., 417; Ram Kumar *v.* Beejoy Gobind, 7 W. R., 535. But where there is *primâ facie* evidence that a tenant holds part of land sought to be enhanced as paying rent, and part as rent-free, or where the tenant starts his case with *primâ facie* proof of a rent-free title, the onus is shifted from the raiyat to the landlord.—Nehal Chunder *v.* Hara Pershad, 8 W. R., 183. In a suit for enhancement of rent, where the tenant undoubtedly holds and pays rent to the plaintiff for lands within his *zemindari*, the mere allegation by the defendant that a portion of those lands is rent-free does not throw the *onus* on the landlord of proving what particular portion of the land which the tenant holds is rent-paying.—Heera Ram *v.* Ashruf Ali, 9 W. R., 103. The *onus* is primarily on the tenant to prove that such portion of the land is so held by him; when he has done so the *onus* is then shifted upon the landlord to rebut such *primâ facie* evidence.—Newaj Bundhopadhya *v.* Kali Prosonno, I. L. R., 6 Cal., 543; 8 C., L. R., 6; Akbur Ali v. Bhyea Lal I. L. R., 6 Cal., 666; 7 L. R., 497. But in a suit for resumption of lands alleged by the defendant to be *lakhiraj*, it has been held that it was not enough to show that they lay within the ambit of the plaintiff's *zemindari*.—Harihur v. Madhub, 14 Moore's I. A., 152; 8 B. L. R., 566. The landlord was bound to show in the first instance that they were part of the *mâl* lands of his estate. This he could do by proof of receipt of rent or that its proceeds were taken into account at the Permanent Settlement, or "by any other sufficient means."—Bachuram *v.* Peari Mohan, I. L. R., 9 Cal., 813

Part rent-free and part rent-paying.

Resumption suit.

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12 C. L. R., 475; Narendra *v.* Bishan, I. L. R., 12 Cal., 182, but see Raja Sahib Persad v. Doorga Pershad, 12 Moore's, I. A., 331. The fact that the land in dispute is surrounded by other lands held by the defendant for which rent is paid, is evidence to show that the land forms part of his tenure and is not his *lakhiraj* holding; but no decree can be passed adversely to the defendant on that fact, unless it be held to establish a *primâ facie* case in favour of the plaintiff. And where, in a suit by a landlord for *khas* possession of land, the defendant set up and proved an intermediate tenure, the onus was held to be on the plaintiff to prove that the parcel of land sought to be resumed was outside such tenure.—Rhidoy Krista v. Nobin Chunder, 12 C. L. R., 457. In a suit for enhancement in which it was contended that the land constituted a grant created before 1793, it was decided that the *onus* was on the plaintiff to show that the land was included in the *zemindari* at the time of the Permanent Settlement, and was therefore liable to enhancement.—Assanulla v. Basaratali, I. L. R., 10 Cal., 920. Where, in a suit for enhancement, the defendant pleads that rent had been assessed on lands covered by hedges and ditches and forming boundaries between fields, and that, according to custom, such lands were not liable to pay rent at all, the *onus* is on the defendant to prove the custom.—Hurro Chunder v. Jogeshar Nundee, 6 W. R., Act X, 46. In a suit for enhanced rent of a *taluk*, the existence of which as an ancient *taluk* is undonbted, and when the only question in the suit is whether the rent is fixed or variable, the *onus* is first on the defendand to prove that he has held at a uniform rent for 20 years, and (if the defendant prove so much) then, on the plaintiff to prove that the rent has varied since the Permanent Sattement.—Rashmani v. Horronath, 1 W. R., 280. When a tenure-holder has proved that he has held the lands at a fixed uniform rent anterior to the Decennial Settlement, then, on failure of evidence of payment of a fluctuating rent by the zemindar, on whom the *onus* probandi lies, the tenure must be held to be an intermediate or dependant *taluk* within the meaning of section 51 of Regulation VIII of 1793.—Bama Sundari v. Radhika, 13 Moor's, I. A. 248; 4 B. L. R., P. C., 8; 13 W. R., P. C., 11. Where enhancement is claimed under section 7 of the Bengal Tenancy Act, and the plaintiff's case is that he is entitled to receive as a fair rent a greater share of the tenure-holder's profit, it is for him to start his case by proving that the existing rate was below the customary rate payable by persons holding similar tenures in the vicinity, or that it was not fair and equitable; but the evidence in that behalf must be of a character sufficient to throw on the defendants the burden of proving that the existing rate is fair and equitable.—Hem Chunder v. Kali Prosunno, I. L. R. 26 Cal., 832. Where a defendant admits being a tenant, but pleads that his tenancy is of a permanent character and that he is entitled to hold at a rate which cannot be enhanced, the *onus* is on him to prove his allegation.—Rajah Khetter Kristo v. Kumar Dinendra Narain 3 C., W. N., 202. When a defendant alleges that he holds a permanent tenure, the burden of proving that fact lies on him, and it is

When intermediate tenure set up.

Liability to enhancement.

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When defendant alleges a permanent tenure.

not for the plaintiff to show that he is not a tenure-holder but only a *raiyat*.—Nilmoni v. Mathura Nath C. W. N., clix. In one case it has been laid down in somewhat broad terms, that, if a plain-

When plaintiff sets up permanent settlement.

tiff sets up as against Government a permanent or perpetual settlement, it is incumbent on him to make out that case.—Prosunno Coomar *v.* Secretary of State, I. L. R., 26 Cal., 792; 3 C. W. N., 695. In a suit by a purchaser at a sale for arrears of revenue to enhance the rents

In suit by auction-purchaser for enhanced rent.

of certain *taluks*, the *onus* of proving that the *taluks* had been held at a fixed an invaria le rent twelve years antecedent to the Permanent Settlement is upon the person setting up such a title.—Gopal Lall *v.* Teluk Chanddir 10 Moo. I. A., 283; 3 W. R. P. C., 183. Proof of existence of the tenure from the time of Decennial Settlement is sufficient to bar a suit for enhacement when the plaintiff is not an auction-purchaser; but when the plaintiff is an auction-purchaser he must show when he purchased, before he can insist upon direct proof of the existence of the tenure twelve years prior to the Decennial Settlement.—Remesh Chander *v.* Modhusudan, 6 W. R., 252. Where the purchaser of an estate at a revenue-sale brought a suit under the

When purchase has been made at revenue-sale.

provisions of section 37 of Act XI of 1859 to eject the defendants from certain lands within the estate, which he alleged they were holding without any protected interest, but which they on their side claimed to hold as a subordinate *taluk* that had been in existence and in the possession of themselves and their predecessors since the time of the Permanent Settlement, and it was found as a fact that the tenure had been in existence since 1798-99, it was *held* that, although in the first instance the burden of proof was on the defendant, yet it had been discharged by the proof of their long possession and of the fact that the *taluk* was in existence a hundred years ago.—Nityananda *v.* Bungsi 3 C. W. N., 341, See also Forbes *v.* Munshi Mahomed Hossein 20 W. R., 44. In a suit to recover

Enhanced rent.

arrears of rent at enhanced rates, the *onus* of proving both the quantity of land held by the defendant and the rates is upon the plaintiff.—Golam Ali *v.* Baboo Gopal Lal, 7 W. R, 56. It lies on the plaintiff to make out distinctly the different grounds on which he rests his right to enhance, *viz.*, excess of area, increase of productiveness apart from the tenant's agency, or increase in the value of produce.—Golam Ali *v.* Gopal Lal, 9 W. R., 65. Poolin Beharee *v.* Watson & Co., 9 W. R., 190; and he must prove that the present rate is not fair and equitable.—Hills *v.* Jendar Mundul 1 W. R., 3. In a suit for rent by a share-holder, when the defendant contends that he is not bound to pay otherwise than "by entirety" to the person entitled to the whole rent, the

In suit by share-holder for rent.

onus is on the plaintiff to show that he is entitled to sue for a fractional portion.—Lalun *v.* Hemraj, 20 W. R., 76. Where a defendant claims reduction of rent on the ground of diluvion, the

When defendant claims reducton.

onus is on him to prove what lands have been washed away.—Savi *v.* Obhhoy Nath 2 W. R., Act X, 28. So also when he pleads remission of rent.—Bunwari Lall *v.* Fur-

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long 9, W. R., 239; Rash Dhary v. Khakon Singh I. L. R., 24 Cal., 433.

When it is alleged that a raiyati holding is transferable.

Where the lands in suit formed part of a *patni* belonging to the plaintiffs, and constituted the *raiyati* holding of one *M*, and, in execution of a money decree against the said M, were sold and purchased by the defendant, in a suit by the plaintiff to recover possession of the lands upon the ground that the holding of *M* was a non-transferable one, and that the defendant consequently acquired no title under his purchase, the defendant alleged that the holding was of a permanent and transferable character; it was *held* that the *onus* lay on the defendant to establish his allegation.—Kripamay Deby v. Durga Govind, I. L. R., 15 Cal., 89, dissenting from Doyes Chand *v.* Anand Chunder, I. L. R., 14 Cal., 382. The *onus* of proving the transferability of an occupancy right without the landlord's consent being thus upon the person alleging it when the allegation is based upon usage or custom, it is necessary to prove thet existence of such usage or custom on the estate of the landlord, or that it is so prevalen in the neighbourhood that it can reasonably be presumed to exist on that estate.—Palukdhari v. Manners, I. L. R., 23 Cal., 179. The onus of proving whether particular land is the proprietor's private land is on the person alleging it to be so.—Hari Das v. Ghansam Narain, I. L. R., 6 All. 286: See section 120 (3) or notes to s. 120 *ante*.

When it is alleged that land is proprietor's private land.

See s. 51 *ante* and notes pp. 225-6 The onus of proving the proper rate is upon the plaintiff, and upon the defendant.—(Samira Khatun v. Gopa Lal Tagore, 1 W. R., 58; Khola Mandal v. Piru Sarkar, 6 W. R., Act X, 18; Ashraf v. Ram Kishor Ghosh, 23 W. R., 288). The fact that a tenant sometime ago gave a *kabulyat* for a limited period at a particular rate of rent is not sufficient to thorw upon the defendant the onus of proving what the present rent is, without any evidence on the part of the landlord that the rent specified in the *kabulyat* had ever been realized from him.—(Makunda Chandra Sarma v. Arpan Ali, 2 C. W. N., 42). In a suit to recover arrears of rent from the defendants who, as ticcadars of the plaintiff's share in a certain mouzah, had been in possession from 1262 to 1281 without having paid any rent, the plaintiff who claimed a bhaoli rent at the rate of 9 annas of the crop, proved that in the mouzah in question the raiyats paid rent at that rate. Held that under the particular circumstances the *onus* was on the defendants who alleged that the proper rate was 8 annas to prove their allegation.—(Lochan v. Anup, 8 C. L. R., 426). In a suit to recover arrears of rent at enhanced rates, the onus proving both the quantity and the rates is upon the plaintiff and not upon the defendant.—(Ghulam Ali v. Gopal Lal Tagore, 1 W. R., 56). It lies on the plaintiff to make out distinctly the different grounds on which he rests his right to enhance, *viz.*, excess of area, increase of productiveness apart from the tenant's agency, and increase in the value of produce.—(Ghulam Ali v. Gopal Lal Thakur, 9 W. R., 65; Pulin Bihari Sen v. Watson & Co., 9 W R., 190; Doma Rai v. Melon, 20 W. R., 416), and he must prove that the present rate is not fair and equitable.—(Hills v. Jendar Mandal, 1 W. R., 9). In a suit to recover arrears of rent from the defendants, who, as *thikadars* of the plaintiff's share in a certain mauzah had been in

Rate of rent.

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possession from 1262 to 1281 without having paid any rent, the plaintiff, who claimed a *bhaoli* rent at the rate of 9 annas of the crop, proved that in the mouzah in question the riayats paid rent at that rate, and it was held that under the particular circumstances, the onus was on the defendants who alleged that the proper rate was 8 annas to prove their allegations—Lochan Chaudhri *v.* Anup Singh, 8 C. L. R., 426.

Rate of rent: Pleadings; Court's duty:—In a suit for rent the Court should find what was the contract between the parties, what the area and jumma, and to what arrears (if any) plaintiff was entitled, and not proceed upon a kind of rule of proportion having reference to a former decision—(Karoona Moni *v.* Kripanath, 18 W. R., 399). In a suit for arrears of rent, where the plaintiff fails to prove the rate of rent claimed in the plaint, it is the duty of the Court to find the proper rate of rent payable by the tenant to his landlord, and not to give a decree merely for the rent admitted by the tenant. In a suit for arrears of rent for the years 1283-5 at the rate of Rs. 2 pe. bigha, it was objected that the plaintiff had previously obtained a decree in respect of the same land against the defendant for the years 1281 and 1282, at the rate of 15 annas per bigha and that they could not now claim at a higher rate, but it appeared that in that suit the Court did not find what was the *proper rent* payable by the defendant, but had merely given a decree at the rate admitted by him to be payable, it was held that, although the decree for the rent of the years 1281 and 1282 was binding between the parties as to the rent of these years, it in no way estopped the plaintiffs in the present suit from proving the proper rate of rent for the years 1283-5—(Punnu Sing *v.* Nirghun Sing, 8 C. L. R., 310; I. L. R., 7 Cal., 298). In this case in the previous suit the rate was not *determined*, and the District Judge said in his judgment: "I record the fact that I do not find as a fact that rent has hitherto been paid at the rate alleged by the defendants. I merely find that it has not been paid at the rate alleged by plaintiffs"; and elsewhere "the defendants' case is very likely to be false." Hence the Court found that when both the plaintiff's and the defendant's allegations are false, the *proper and actual rate of rent* ought to have been determined; where it is not determined but a decree given according to a defendant's admitted rate which was not true, that decree will not bind the parties for rents of future years. Where, however, a rate of rent is determined and decreed to a landlord for a certain year, it is binding on the tenant as regards the ensuing years until the latter obtains a decree to a different effect—(25 W. R., 10). So in Jeolal *v.* Surfun, 11 C. L. R., 483, the plaintiff in a suit for rent having failed to prove the amount the rent claimed by him, the Court, in trying the issue "what is the proper amount of rent payable to the plaintiff," gave the plaintiff a decree for the amount admitted by the defendant, that amount being less than that claimed by the plaintiff. In a later suit, the plaintiff sued the defendant in respect of the same holding for the rent of a subsequent year, and he claimed at the same rate as he had claimed in the previous suit. It was held (Mitter, J., dissenting) that the decree in the former suit was *resjudicata* as to the proper rent payable by the defendant. See notes under the head of *Exparte decree and Resjudicata*. A zemindar and patnidar being bound together by the terms of a written contract,

The proper rate should be determined.

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the patni potta, the zemindar can only sue for rent on the terms of that contract, but not for rent for the use and occupation of this—(Watson and Co. *v*, Tarini Churn, 18 W. R., 494; Dhunendra Chunder *v*. Laidlay, 20 W. R., 400). In a suit for arrears of rent where defendant's plea of payment falls to the ground, the fact of plaintiff having sued upon a false ground is no reason why he should not obtain a decree at the rate fixed by a former decree as the proper rate demandable from the defendant—(Kishen Mohan *v*. Rajoo, 19 W. R., 233). When defendants admitted having held certain bhaoli land, but that it was washed away, and the first Court regarded the plea as untenable, it was held that this was not an absolute finding that there had been no diluvion, and that the Court was not bound to fix on defendant's admission and hold him liable for rent of the bhaoli land—(Chamaro *v*. Tota, 19 W. R., 430). When a landlord sues a raiyat for arrears of rent alleged to be due under a kabuliyat, and the Court finds that such kabuliyat has not been executed by the defendant but it appears notwithstanding that the raiyat occupied the land under the zemindar, the landlord's right to have a further trial of the question whether any rent and how much is due will depend upon the claim stated in the plaint. If that claim is in the alternative and the raiyat thus has notice that on failure to prove the kabuliyat, the landlord will claim rent for the occupation of the land, the landlord is entitled to have that issued tried; but if a claim for rent on account of such occupancy is not in the plaint, the landlord is not so entitled, although it is in the discretion of the Court to amend the plaint on the issue, and when the omission has been from inadvertence or mistake, it would generally be proper to do so—(Lakhikanta *v*. Samuruddin, 21 W. R., F. B., 208). Although a plaintiff need not be tied down to the exact form of his plaint, yet when he seeks to introduce any change, he must show that the view of the matter which he now puts forward had been in the contemplation of the parties, so that they had an opportunity of bringing forward evidence on the point, and that the evidence on the record was directed to the substantial case set up. In a suit for arrears of rent plaintiff must show that there was some contract to pay rent entered into by defendant. This may be shown either by the evidence of some specific contract or by evidence of previous payment from which a contract could be inferred.—(Luchmeeput *v*. Sheik Enyet, 22 W. R., 346.) But when a plaintiff simply sues on o kabuliyat and fails to prove it, his suit must be dismissed.—(Bhyrub Chunder v. Haradhun, 2 Hay, 666.) So where the claim was at the rate fixed by the revenue officer acting under Act VI (B. C.) of 1862, s. 10, and was dismissed on the ground that the officer had not the power to assess such rent as he thought proper, it was held that the plaintiff, whose claim was not in the alternative, was not entitled to a decree at the rate previously paid.—(Dwarka Nath *v*. Ram Lochun, 23 W. R., 465); and when a landlord fails to prove his kabuliyat, and there is no evidence to show what rate of rent he is entitled to, it is not wrong to take as rent the amount admitted by the defendants.—(Robinee Kant *v*. Shureekoonissa, 20 W. R., 64. Similarly when a landlord sues his tenant for rent due at a certain rate, but fails to prove his claim to more than the defen-

Kabuliyat.

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dant admits, he is entitled to a decree for the amount admitted to be due—(Hulodhur *v.* Seetul Chunder, 23 W. R., 85). In a suit for arrears of rent where plaintiff failed to make out his claim to bhaoli rent, and the first Court, finding that there was evidence of a commutation, dismissed the suit with a reservation of the plaintiff's right to bring a fresh suit for nukdi rent, and the lower Appellate Court finding that the defendant had admitted owing rent in money decreed the claim to the extent of the admission, it was held that the lower Appellate Court was right, and that the reservation of right by the first Court was of doubtful operation—(Musst. Bibi Jan *v.* Bhajul Singh, 21 W. R., 438). In a suit for bhaoli rent where the quantity of land is disputed and the landlord produces as evidence a khusra or appraisement of the land, it is not necessary for him to show that the estimate was drawn up in defendant's presence and acknowledged by him but only that defendant had notice when the khusra was about to be made—(Haree Narain *v.* Beljeet Jha, 24 W. R.. 125). Where a proposal of a nukdi settlement is refused by a tenant who has heretofore paid rent in kind, but whose tenancy has expired, the landlord is quite at liberty to let the land to another person—(Budhoo Raot *v.* Dursun Mahaton, 24 W. R., 218). A landlord who refuses to accept bhaoli rent or rent in kind when offered to him, on the ground that he is suing for a money rent, cannot on the dismissal of his suit, come into Court again and sue his tenant for the value of what he refused when it was proffered—(Mohunt Narain *v.* Gour Sarun, 23 W. R., 368). Section 20 of Act IX of 1880 B. C. (s. 7 of Act X of 1871 B. C.) provides: "Every holder of an estate of tenure, in respect of which a return has been made as required by this chapter, shall be precluded from suing for or recovering—(*a*) any rent whatsoever for any land, holding or tenure, forming part of the estate or tenure to which such return relates, but which has not been mentioned in such return, unless it be proved that the holding or tenure for the rent of which the rent is claimed, was created subsequently to the lodging of such return; (*b*) rent at any higher rate than is mentioned in such return for any land, holding or tenure, included in such return, unless it be proved that the rent of such land or tenure has been lawfully enhanced subsequetnly to the lodging of such return; Provided that the Collector may at his discretion, at any time within six months from the presentation of any return made under this part, receive a petition correcting any such return; and on the acceptance of such petition may make such correction in the valuation of the estate or tenure as may be required and as soon as the person in respect of whose estate or tenure the return and valuation have been so corrected, shall have paid in all sums due by him as road-cess and public works cess in accordance with such corrected valuation, and not otherwise, such person may recover such rent as may be due to him on any tenure or land included in the return of such estate or tenure at any rate not being in excess of the rate shown in the corrected return as payable in respect of such tenure or land. Such notice as the Collector may direct shall be served upon the parties affected by such petition at the expense of the person lodging the return as aforesaid."

Bhaoli rate.

Road-cess return; no higher rate realizable than entered in it.

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The owners of rent-free lands are not bound to pay roadcess before publication of the valuation rolls, and no presumption in favour of such publication can be made under section 114, cl. (*e*), of the Evidence Act.—(Ahsanullah Khan Bahadur v. Trilochan Bagchi, I. L. R., 13 Cal., 197; Rash Behari Mukerjee *v.* Pitambori Chowdhrani, I. L. R., 15 Cal., 237. But this rule does not apply to rent-paying land, in respect of which publication of the valuation rolls has to be made not under section 52, but under section 35 of the Cess Act. It would appear from the provisions of sections 36 and 41 of the Act that "the publication of the valuation rolls is not a condition precedent to the attaching of liability to pay roadcess for rent-paying lands."—(Mussu. Bhugwati Kunwari Chowdrani *v.* Chhatarpat Singh, [illegible] Cal., W. N., [illegible] under sec. 19, Act IX of 1880, B. C., (The Cess Act) holders of estates or tenures in respect of which notices of valuation or re-valuation have been issued, are absolutely precluded from suing for or recovering rent for any land or tenure situated in estates or tenures in respect of which no returns have been lodged, and *bhaoli* land must be included in such returns (Jagmohan Tewari *v.* Finch, I. L. R., 9 Cal., 62; 11 C. L. R., 100). A higher rate than what is stated in the road-cess return is not recoverable under s. 20 Act IX of 1880 B. C. See notes against "cess" under the head of Rate of rent.

Owners of rent-free lands not bound to pay road-cess before publication of valuation rolls.

Rent must be stated in the cess return, otherwise not recoverable higher rate not recoverable.

Cesses:—Cesses recoverable under any enactment are rent, within the meaning of its definition—See s. 3 (5), p. 35. For "illegal cesses," see s. 74 and notes *ante*. Roadcess and Public Works cess are recoverable under s. 25 of Act X of 1871, B. C. (s. 47 of Act IX of 1880, B. C.), in the same way as rent. But where the defendants executed a kabuliyat, dated the 1st October 1870 which contained the following stipulation, "if in future any chowkedari tax or any other new abwab or tax or fee or Kor or any additional fee on jumma be fixed upon the mehal by Government, I will pay that separately,"—in a suit by the zemindar for increase of rent the defendant claimed to set-off a sum representing the amount which the zemindar was bound to contribute under the Road Cess Act and Public Works Cess Act, and which amount they had paid to the Collector, it was held that the amount in question came within the terms of the kabuliyat, and that the defendants were not entitled to the set-off claimed by them—(Shambhunath *v.* Huro Sundari, 11 C. L. R., 140.) In 1862, at the time the income-tax was in force, *A* made a putni settlement of certain land with *B*, *B* agreeing to pay any enhancement of the revenue that might be made by Government at any time or 'any impost in future to be laid by Government, the income-tax to be paid by *A* according to his income, *B* having nothing to do with the same." In 1876 *A* brought a suit against *B* for arrears of rent. *B* under the contract claimed to have a set-off as a tax on income, a sum which he had paid under the Roadcess Act which had been passed in 1871 after the Income-Tax Act had been repealed. It was held that the tax imposed by the Roadcess Act passed by the Bengal Council could not be considered to be tax on income; the income-tax having been a tax imposed by the Government of India on a person's annual income, levied upon whatever

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actually came to his hands as income, and not upon the value of his property, and that therefore B could not set off the amount as being income tax. It was also held that, although the Roadcess Act contains no saving clause in favor of contracts, it does not prohibit in future the making of contracts which shall interfere with the incidence of the roadcess as directed by the Act, nor vacate contracts that may have been made befere the passing of the Act; and in the absence of any provisions to that effect, an agreement entered into before the passing of the Act could not be affected by the subsequent passing of the Act—(Surnomayee Debi *v.* Kumar Purchnaraia Roy, I. L. R., 4 Cal., 576).

Admissions by co-tenants:—When two persons are sued for rent as joint tenants, an admission by one of them regarding the correctness of the plaintiff's claim does not bind the other. If they had been sued on the allegation that they held the holding jointly, a separate decree for half the amount admitted cannot be made against the tenant who had made the admission.—(Chundareshwur Narain Pershad *v.* Chuni Ahir, 9 C. L. R., 359.) Similarly, an admission by one raiyat as regards the rate at which he holds is no evidence against his co-raiyats.—(Norohurry Mohant *v.* Naraini Dassi, W. R., Sp. No., F. B., 23.) Nor is the admission of a co-sharer tenant that a particular person is the landlord of the holding any evidence against the others.—(Kali Kishore Chowdhry *v.* Gopi Mohan Roy, 1 C. W. N., cliv.) But where one co-tenant is allowed by his co-sharers to hold himself forth as the real holder of the tenancy, and to get his name registered, and the rent receipts stand in his name, a decree obtained against him binds the others.—(Moti Lall Poddar *v.* Nripendra Nath Roy, 2 W. N., 172.)

Ex-parte and Unexecuted decrees:—In Kali Kant Rai *v.* Ashrafunnissa, (2 W. R., 326) it was ruled that in suit for enhancement *ex parte* summary decrees for rent are not satifactory proof that a variation has taken place in the amount of the rent paid. A rent decree, not having been executed within the period allowed by law for execution, was no decree and no evidence against the fact of an intervenor having actually received the rents *bonâ fide*.—Ram Sundar Tewari *v.* Srinath Dewari, (10 W. R., 215; 14 B. L. R., 371.) An *ex parte* decree for rent at a certain rate is not conclusive proof that the land was held for the years to which the decree relates at that rate, until it has been executed.—(Banee Madhub v. Bhagabut Pal, 20 W. R., 466; Bishun Prasad *v.* Ramgiri Chella, 20 W. R., 3.) So where a suit is tried *ex parte* and no issues of facts are raised beyond the general issue involved in the claim, the decree considered as evidence is only evidence that the amount of rent decreed was, at the time due from the defendant to the plaintiff, but it is no evidence of the amount of the rental of the holding.—(Goya Persad *v.* Tarini Kant, 23 W. R., 149.) But in Maharaja Beer Chunder *v.* Ram Kishen, 23 W. R., 128, F. B., 14 B. L. R., 370, Couch, C.J., observed:—'We are of opinion that the decree (which was *ex parte* and time-expired) is admissible in evidence. The question of its value, when admitted, is to be determined by the Lower Courts." The same case again came

Ex-parte decree not conclusive.

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to the Court after remand, and it was held that where the plaintiff sued the defendant for a year's rent at the same rate which had been decreed to him for the previous year in a suit which he had brought against the same defendant for rent of the same property, and relied upon the former decree, and which had been obtained *ex parte* as evidence of the rent due to him from the defendant, it was held that the decree in the first suit determined the amount of rent due from the defendant to the plaintiff, and also that the decree, and his right to take out execution was barred by limitation. —(Bir Chunder *v.* Hurish Chunder, I. L. R., 3 Cal., 383.) See also Mahomed Kana *v.* Ran Mahomed, 24 W. R., 254. But these decisions do not find that *ex parte* decree is conclusive evidence. So it has been held that a decree obtained *ex parte* is not final within the meaning of expln. 4, s. 13 of Act X of 1877. Such a decree is not conclusive evidence of the amount of rent payable by the same defendant in another suit for subsequent rent of the same property. Where the plaintiff sued the defendant for a year's rent at the same rate which had been decreed to him for previous year in a suit which he had brought against the same defendant for rent of the same property, and relied upon the former decree which had been obtained *ex parte* and which he also alleged had been duly executed as evidence of the amount of rent due to him by the denfendant, but it appeared that the LowerCourt had found that the alleged execution proceedings were fraudulent, and that no steps had been taken which gave finality to decree, it was held that the decree was not conclusive evidedce of the amount of rent due from the defendant or of the questions with which it dealt.—(Nilmoney Sing *v.* Heera Lall, I. L R., 7 Cal., 23.) The Court obseved in this case: "Our present decision does not conflict with that in Bir Chunder Manikya *v.* Hurish Chunder Das inasmuch as the question here is, whether the plaintiffi had a right to use *ex parte* decree as conclusive." This ruling was followed in Bhagirath Patuni *v.* Ram Lochan, I. L. R., 8 Cal., 275. It was suit for rent of a half share of land; the plaintiffs relied upon an *ex parte* decree for rent at a certain rate which they had obtained in 1869, against the tenants of this share. The defendants relied upon a subsequent decree in a contested suit by plaintiffs against the tenants of the other half share in which a lower rate of rent had been given. No other evidence than the decrees was produced on either side. It did not appear whether the *ex parte* decree had been executed. *Held*, that it was open to the defendants to dispute the rate of rent, and that the plaintiffs were bound to prove that they were entitled to recover it. In a suit for rent the plaintiff claimed that he was entitled to payment both in cash and kind; and in order to show that he was entitled to recover rent in kind tendered two *ex parte* decrees obtained by his predecessor against the persons registered as tenants of the tenure at the time the decrees were obtained, such decrees being for rent both in cash and kind. It appeared that the defendant was the owner of the tenure at the time the two decrees were passed, having acquired the tenure by foreclosure, although he had not registered the transfer in the plaintiffs' books, and that he was not made a party to the suit in which the decree was passed. *Held* that, as the defendant was not a party to the suit in which the decrees were obtained, and did not claim through the parties against whom they were passed they were not admissible in the suit as evindence

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against him. An *ex parte* decree obtained against theregister ed tenant is not admissible as evidence against an unregistered transferee not a party to it.—(Ram Narain Rai *v.* Ram Kumar Chandra, I. L. R., 11 Cal., 562). On the other hand, in Chandra Kumar Datta *v.* Jai Chandra Datta, 19 W. R., 213, it was said that a defendant who omits to defend a suit and allow an *ex parte* decree to be passed against him cannot afterwards object to the decree as no evidence. So it was held that decrees did not become ineffectual, because they have not been executed.—Ram Sundari *v.* Ram Prosad, 8 W. R., 288; Durga Charan *v.* Dayamayi, 20 W. R., 243. In Jagadamba *v.* Tarakant, 6 C. L. R., 121, their Lordships of the Privy Council held that the effect of an appeal decided by them *ex parte* could not on that ground be disputed. In Hansu Koer *v.* Sheogovind, 24 W. R., 431, it was held that an *ex parte* decree is admissible in evidence as *quantum valeat* against a person who was no party to it. These conflicting decisions led to the Full Bench in the case of Madhu Sudan *v.* Brae, I. L. R., 16 Cal., 300. In this case, four questions were referred by the referring Bench for the decision of the Full Bench, (1) whether an *ex parte* decree for rent operates so as to render the rate of rent *res judicata* between the parties? (2) where it so operates, if the rate of rent alleged by the plaintiff is recited in the decree, without any express declaration that the rate of rent so alleged has been proved? (3) whether it so operates, if the rate of rent alleged is expressly declared by the decree to have been proved? (4) whether an *ex parte* decree operates so as to render any question decided by the decree *res judicata* in the absence of proof that such decree has been executed? The Full Bench answered the first three questions in the negative. It was said:—"The mere statement of an alleged rate of rent in the plaint in a rent suit in which an *ex parte* decree is made, is not a statement as to which it must be held that an issue within the meaning of sec. 13 of the Code of Civil Procedure was raised between the parties, so that the defendant is concluded by the decree. Neither a recital in the decree of the rate alleged by the plaintiff nor declaration in it as to the rate of rent which the Court considers to be proved would operate in such a case as to make that matter a *res judicata*; assuming, of course, that no such declaration were asked for in the plaint as part of the substantive relief claimed, the defendant having a proper opportunity of meeting the case." The fourth question propounded by the referring Bench was not answered. In the recent case of Madhu Manjari *v.* Jhumar Bibi (1 C. W. N., 120), it was held that an *ex parte* decree for arrears of rent which has been duly executed is some evidence as to the rate of rent. See also Mati Lal *v.* Nripendro Nath Rai, 2 C. W. N., 172. But an *ex parte* decree which has never been executed is no evidence as to the rate of rent.—(Ram Chandra *v.* Haro Gobindo, 1 C. W. N., cxxviii).

Proof: Jamabundis, Jamawasilbakis and Chittas:—The value of these document are only of a corroborative character. *Jamabundis* represent the rent-roll of the estate; *Jamawasilbakis* show the rent-roll as well as collections and arrears; and *Chittas* are the measurement records of raiyati holdings. They are no evidence *perse* and can only be used as corroboration proof when they are produced by a person who has collected rent under them and who merely uses them for the purpose of refreshing his memory.- (Mahomed Mahmud *v.* Gafurali, I. L. R., 11 Cal., 467;

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Gobind Chunder *v.* Anlo Beebee, 1 W. R., 49; Allyat Chinaman *v.* Jugut Chunder 5 W. R., 242; Khuromoni *v.* Bejai Govind, 7 W. R., 533; Ramlal *v.* Tara Sundari 8 W. R., 280; Sheik Newazi *v.* Lloyd, 8 W. R., 464; Beejoy Govind *v.* Bheekoo Roy, 10 W. R., 291; Moheema Chunder *v.* Purno Chunder, 11 W. R., 165; Belaet Khan *v.* Rashbihari, 22 W. R., 549; Surnamayi *v.* Johur Mahomed, 10 C. L. R., 545. Accordingly *Jamabandi* paper can never be treated as independent evidence of any contested fact.—(Chamarni Bibi *v.* Aimullah Sardar, 9 W. R., 451). *Jamabandi* papers can only be used as corroborrtive evidence of the same value as that which is attached to books of acconnt.—(Gajju Koer *v.* Ali Ahmad, 14 W. R., 474; 6 B. L. R., App., 62). *Jamabandi* papers for the years in respect of which rent is claimed, prepared by the officers of the person claiming the rent, cannot be evidence of his right to that which is set forth, though the evidence of the *patwari* as to the amount collected in former years, corroborated by the *jamabandis* of those years, would be conclusive (Dhanukdhari Sahi *v.* Toomey, 20 W. R., 142). But the *jamabandis* papers of a former *patwari* are valueless without the personal tistimony of the *patwari*.—(Bhagwan Datta Jha *v* Sheo Mongal Singh, 22 W. R., 256.) *Jamabandi* papers filed by a propietor in *batwara* proceedings to which the tenant is not necessarily a party cannot be used as evidence against such tenant in as suit for arrears of rent (Kishor Das v. Parsan Mahtun, 20 W. R., 171). A purchaser of a *khas mahal* cannot sue for enhanced rent upon a *jamabandi* to the terms of which the tenant has not consented.—(Inayatullah Miah *v.* Nubo Kumar Sarkar, 20 W. R., 207; Reazudin Mahomed *v.* McAlpine, 22 W. R., 540), Where tenant, who were *aimadars,* voluntarily signed a *jamabandi* drawn up under sec. 9, Reg. VII of 1822, specifying the amount of rent payable by them, it was held to be evidence against them.—(Watson v. Mohendra Nath Pal, 23 W. R., 436). A *jamabundi* prepared by a Deputy Collector, while engaged in the settlement of land under Reg. VII of 1822, is a public document within the meaning of s. 74 of the Evidence Act. It is not necessary to show that at the time when such document was prepared, a raiyat affected by its provisions was a consenting party to the terms specified.—(Taru Patar v. Abinash Chandra Datta, I. L. R., 4 Cal., 79)., In Akshai Kumar Datta v. Shama Charan Patitanda, (I. L. R., 16 Cal., 586) however, a doubt was expressed as to whether a *jamabaudi* drawn up under Reg. VII of 1822 was a public document, and it was ruled that to make the enhanced rent stated in such a *jamabandi* binding upon a tenant, there must be either an assent to that enhancement, or else a compliance with the provisions of the rent law with reference to enhancement of rent in force at the time of such enhancement. Similarly *jamawasilbakis,* or collection papers, are not evidence by themselves. The mere production of such papers is not enough. But coupled with other evidence, they often afford a very useful guide to the truth.—(Roshan Bibi v. Hari Krishna Nath, I. L. R., 8 Cal. 926). *Jamawasilbakis* are not independent evidence of the amount of rent mentioned therein, but it is perfectly right that a person who has prepared such *jamawasilbaki* papers on receiving payment of the rent should refresh his memory from such papers when giving evidence as to the amount

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of rent payable.—(Akhil Chandra Chaudhri v. Nayu, I. L. R., 10 Cal, 248). Certified copies of survey measurement *chittas*, field books and maps are admissible in evidence.—(Gopinath Singh v. Anandmayi Debi, 8 W. R., 167). Whatever may be the value of *chittas* in questions between the zemindar and his tenants, they cannot be received as evidence of boundary against a rival proprietor without further account, introduction or verification.—(Ekkauri Singh v. Hira Lal Sil, 11 W. R., P. C., 2 ; 2 B. L. R., P. C., 4). But they may be evidence in such cases, if proved to be genuine and attested.—(Sudakhina Chaudhrani v. Raj Mohan Basu, 3 B. L. R., A. C., 377). When *chittas* were produced by the plaintiff as evidence of certain lands being rent-paying, it was held that they were sufficiently attested by the deposition of the village *gumastha* that they were *chittas* of the village when he was *gumastha*, and that he had been present when, with their assistance, the measurement of the lands of the village had been tested.—(Debi Prasad Chaturji v. Ram Kumar Ghosal, 10 W. R., 443). *Chittas* not duly proved are not legal evidence, though admitted by the Lower Court without objection from the opposite party.—(Izzatullah Khan v. Ram Charan Ganguli, 12 W. R., 39). *Chittas* and maps made in contemplation of resumption proceedings in the presence of both parties and signed by the parties are legal evidence.—(Sham Chand Ghosh v. Ramkrishna Behra, 19 W. R., 309) *Batwarah chittas* are no evidence between raiyats in a suit for possession of a *jote*.—(Gopal Chandra Saha v. Madhab Chandra Saha 21 W. R.. 29). When a *chitta* describes certain land as a *taluk*, this, in the absence of evidence to the contrary, implies a permanent interest.—(Krishna Chandra Gupta v. Safdar Ali, 22 W. R., 326). *Chittas* produced from the Collectorate, when there is nothing to show that they are the record of measurements made by any Goverment officer, are not public documents (Nityanand Rai v. Abdur Rahim, I. L. R., 7 Cal., 76.) *Chittas* made by the Government for its own use are nothing more than documents prepared for the information and guidance of the Collector, and they are not evidence against private persons for the purpose of proving that the land described in them was or was not of a particular character or tenure.—Ram Chandra Sao v. Banseedhur Naik I. L. R., 9 Cal., 741 ; F. B. See also Junmajoy Mullick v. Dwarkanath Mytee I. L. R., 5 Cal., 287, s. c., 4 C. L. R., 574.

Road-cess return:—Under section 95 of Bengal Act IX of 1880, roadcess returns are admissible in evidence against the person by or on behalf of whom they have been filed, but are not admissible in his favor. Road-cess papers are not admissible against a tenant either as substantive or corroborative evidence of the amount of rent payable by him.—Mahomed Mahmud v. Gufarali, I. L. R., 11 Cal., 407 ; or against another shareholder.—Nasiram v. Gouri Sunkur, 22 W. R., 192. Simple statements made by deceased *ijaradars* in Cess returns filed by them regarding assets of their tenancy are not admissible in evidence against third persons.—Hem Chandra v. Kali Prosunno, I. L. R., 26 Cal., 832. It has, however been held that under s. 13 of I of 1872 road cess papers are evidence *quantum valeat*.—Daitari Mohant v. Jugovundhu, 22 W. R., 297.

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The landlord need only proceed against his recognised tenant:—Under the old law, the landlord was only bound to sue his registered tenant for rent.—Huree Churn Bose v. Meharoonissa Bibee, 7 W. R., 318: Forbes v. Protap Singh Doogur, 7 W. R., 409; Sadhan Chander Bose v. Gooroo Churn Bose, 15 W. R., 99; Suddye Purira v. Boistab Purira, 15 W. R., 261; Dwarka Nath Mittra v. Nobango Monjari Dasi, 7 C. L. R., 233. The cognizance or supposed cognizance by the landlord of the purchase of a tenure was held not to be sufficient to cure the defect of non-registration.—Sarkies v. Kali Kumar, W. R., Sp., No., Act X, 98. But if he recognised a new tenant, by accepting rent from him, (Nobo Coomar v. Krishna Chunder, W. R., Sp., Act X, 112; Mirtunjoy v. Gopal Chunder, 10 W. R., 466; 2 B L. R., A. C., 131 Bhurut Roy v. Gunga Narain Mohapattur, 14 W. R., 211; Dhunput Singh Roy Bahadoor v. Vellayet Ali, 15 W. R., 21; Anund Moyee v. Mohendro, 15 W. R., 264. (Allender v. Dwarkanath Roy, 15 W. R., 320), or in any other way, (Mea Jan Munshi v. Karuna Moyi, 8 B. L. R., A. C., 1)., as by allowing sums paid into the Collectorate to be crried to his credit, (Ram Gobind v. Dashobhuja, 18 W. R., 195, or by selling his raiyat's right and interest in the tenure, (Prasunno Mayi v. Bhobotarini, 10 W. R., 494,) he could not resile and sue his old tenant. He can recognise him to what extent he pleases—(Ganesh Das v. Ram Pershad, 5 C. W. N., clxxv). If a holding had been let to more than one raiyat, the raiyats must all be sued.—(Roopnarain v. Juggoo Singh, 10 W. R.304.) The unregistered transferee of a transferable tenure could not be treated by the landlord as a trespasser and was entitled, as against the landlord, who had evicted him, to be restored to possession.—(Nabeen Kishen v. Shib Pershad, 8 W. R., 96.) Under the present Act if an occupancy-holding is transferable by custom, and the raiyat transfers it without notice to the landlord given in the manner prescribed by the law, he remains liable for arrears of rent accruing due after the transfers. Accordingly, the landlord may sue either the raiyat or the transferee, or both, for the whole of such rent.—See s. 73 *ante*. When a landlord has obtained a decree for rent against his registered tenant, a transferee of the holding who acquired an interest in it after the decree, cannot mantain a suit to set aside the decree except on the ground of fraud, nor is he entitled to a refund of the money paid in satisfaction of the decree—(Jadu Nandan Tewari v. Tirbhuban Tewari, C. W. N., clxiv). Althongh the landlord is entitled to look to the recorded tenant only for his rent, this does not relieve the unrecorded tenants of their equitable liability to pay their share of the rent to the recorded tenant who has been obliged to pay the whole. Even when one of the unrecorded co-tenants has sold away his interest before date of suit, this will not relieve him of his liability, even when he has derived no advantage from the payment made, if he was a co-tenant at the time when the liabilty for the rent arose.—(Govinda Chandra Chakravartii v. Basant Kumar Chakravartii, 3 C. W. N., 384). A decree for arrears of rent may be given against the real lessees in possession, although no previous realisation of rent directly from them is established, and no written agreement is shewn to have been

Refund of money to transferee.

Contribution between tenants.

Real tenant may be sued.

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executed by them in their own names, another party being the ostensible holder ofthe lease and not denying liability.—(Jadunath Pal *v.* Prasanna Nath Datta,9 W. R., 71; Bipin Bihari Chaudhri *v.* Ram Chandra Rai, 14 W. R., 12; 5 B. L. R., 234; Ram Tarak Ghosh *v.* Biressar Banurji, 6 W. R., Act X, 52; Jirabatunnissa *v.* Ram Chandra Das, 6 W. R., Act X, 36.) As to benami-holder, see p. 441 *ante*. There is no privity between the landlord and any person holding a subordinate interest in a tenure or holding. Accordingly, such a person cannot be joined in a suit brought for rent against the actual tenant, much less can be made liable for it.—Macnaghten *v.* Bhikari Singh 2 C. L. R., 323; Pertab Udai Nath Sahi Dev *v.* Pardhan Mokand Singh I. L. R., 25 Cal., 399; 2 C.W. N., 96. But the landlord may sue a mortgagee in possession for rent.—*Ibid.*

Privity between landlord and subtenant.

Res judicata:—A previous decision in a suit for rent operates as *res judicata* in a subsequent suit where the amount of rent subsequently accrued due is in issue.—Jotindra Mohan *v.* Shambhu Chunder, 4 C. W. N., 43. In a suit for arrears of rent, where the plaintiff fails to prove the rate of rent claimed in the plaint, it is the duty of the Court to find the proper rate of rent payable by the tenant to his landlord, and not to give a decree merely for the rent admitted by the tenant. In a suit for arrears of rent for the years 1283-5 at the rate of Rs. 2 per bigha, it was objected that the plaintiff had previously obtained a decree in respect of the same land against the defendant for the years 1281 and 1282 at the rate of 15 annas per bigha, and that they could not now claim at a higher rate, but it appeared that in that suit the Court did not find what was *proper rent* payable by the defendant, but had merely given a decree at the rate admitted by him to be payable. It was held that although the decree for the rent of the years 1281 and 1282 was binding between the parties as to the rent of these years, it in no-way estopped the plaintiffs in the present suit from proving the proper rate of rent for the years 1283-5.—(Punnu Sing *v.* Nirghun Sing, 8 C. L. R., 310; I. L. R., 7 Cal., 238.) In this case in the previous suit the rate was not *determined* and the District Judge said in his judgment: "I record the fact that I do not find as a fact, that rent has hitherto been paid at the rate alleged by the defendants. I merely find that it has not been paid at the rate alleged by plaintiffs;" and elsewhere "the defendants' case is very likely to be false." Hence the Court found that when both the plaintiffs' and the defendants' allegations are false, the *proper and actual rate of rent* ought to have been determined; where it is not determined but a decree given according to a defendant's admitted rate which was not true, that decree will not bind the parties for rents of future years. Where, however, a rate of rent is determined and decreed to a landlord for a certain year, it is binding on the tenant as regards the ensuing year until the latter obtains a decree to a different effect.—(25 W. R., 10). So in Jeolal *v.* Surfun, 11 C. L. R., 483, the plaintiff in a suit for rent having failed to prove the amount of rent claimed by him, the Court, in trying the issue "what is the proper amount of rent payabl to the

As to amount of rent.

The proper rate should be determined.

Effect of decree at a certain rate; res judicata or not.

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plaintiff," gave the plaintiff a decree for the amount admitted by the defendant, that amount being less than that claimed by the plaintiff. In a later suit, the plaintiff sued the defendant in respect of the same holding for the rent of a subsequent year, and he claimed at the same rate as he had claimed in the previous suit. It was held (Mitter, J., dissenting) that the decree in the former suit was *res judicata* as to the proper rent payable by the defendant. The seeming conflict between these two cases has been explained in Hari Bihari *v.* Pagan Ahir, I. L. R., 19 Cal., 659, in which it was said that whether in these circumstances the former decision acted as *res judicata* or not, would depend on whether in the previous suit all that had been determined was that the plaintiff should recover from the defendants as rent for the period in question the sum admitted by them to be due, or whether what was decided was that the sum admitted by the defendant was the proper amount of rent payable for the land in suit for the year or years in question. The decision in this case was followed in Bakshi v. Nizamudin, (I. L. R., 20 Cal., 505) in which approval was expressed of the rule said to be therein laid down, *viz.*, that where in a rent suit a Judge tries the question and gives judgment on the question "what is the yearly rent," and makes that the foundation of his judgment, that becomes *res judicata* between the parties. See also Bhuban Mohan Sen *v.* Durga Nanda Das, 2 C. W. N., cciii. A decision in a suit where the rate of rent is not in issue does not operate as *res judicata* as regards the rate in a subsequent suit.—(Balaram Mundal *v.* Kartik Chandra Rai, 4 C. W. N., 161). In Rash Dhari Gop *v.* Khakon Singh, I. L. R., 24 Cal., 433, it has been ruled that in suit for arrears of rent, when the plaintiff fails to prove that the defendant holds at the rate alleged, it is not the duty of the Court to ascertain what is a fair rate, unless asked to do so and it was pointed out that the case of Pannu Singh *v.* Nirghin Singh, I. L. R., 7 Cal., 298 does not lay down that it is bound to do so. Previous decrees for cesses at a certain rate obtained by a landlord against a tenant do not operate as *res judicata* in a subsequent suit for cesses claimed at a higher rate, although they are admissible as evidence in the suit and may raise a presumption against the tenant.—(Ricketts *v.* Rameswar Malia, I. L. R., 28 Cal., 109). Nor is a tenant, who had not objected in a previous suit to the recovery of an illegal cess, debarred from raising the same plea in a subsequent suit.—Woomesh Chandra *v.* Barada Das, I. L. R. 28 Cal., 17. The mere statement of an alleged rate of rent in the plaint in a rent-suit in which an *ex parte* decree is made, is not a statement as to which it must be held that an issue, within the meaning of section 13 of the Code of Civil Procedure, was raised between the parties so that the defendant shall be concluded by the decree. Nor would a recital in the decree of the rate alleged by the plaintiff, or a declaration in it as to the rate of rent which the Court considers to be proved, operate in such a case so as to make that matter *res judicata*, assuming, of course, that no such declaration were asked for in the plaint as part of the substantive relief claimed, the defendant having a proper opportunity of meeting the case.—(Madhu Sudun *v.* Brae, I. L. R., 16 Cal., 300. F. B.,) An

Cesses.

Ex parte decree.

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ex parte decree for arrears of rent is mere evidence as to rate of rent.—Madhu Manjari *v.* Jhumar Bibi, 1 C. W. N., 120; Mati Lal *v.* Nripendra Nath, 2 C. W. N., 172. Whereas one which has never been executed is no evidence as to the rate of rent.—(Ram Chandra, v. Huro Govinda 1 C. W. N., cxxviii. A question between landlord and tenant, heard and decided by a Revenue-officer under section 106, will operate as *res judicata* between the same parties in a subsequent suit brought to try the same question. Where it is necessary to determine the status of the tenants in order to decide what is a fair and equitable rent, that question, as also the question relating to fair and equitable rent having been determined will be *res judicata* between the parties.—Durga Churun *v.* Hatem, 5 C. W. N., clv; The Secretry of State *v.* Nitye Sing, I. L. R., 21 Cal., 38 distinguished. The words "objection" and "dispute" in section 105 are not synonymous, and accordingly it has been held that an order of a Settlement-officer disposing of an objection under section 105 has not the effect of *res judicata*, precluding the parties from questioning in the Civil Court the correctness of the entries to which objections were taken before that officer.—Secretary of State v. Kajimuddy, I. L. R., 23 Cal., 257. In one case, where the plaintiffs initiated proceedings under section 106 against the landlord and certain other defendants who claimed to be rival tenants of the land, to have their names recorded as tenants in the settlement-proceedings and it was held by the Settlement-officer that the plaintiffs were the tenants, the landlord did not appeal against the order, but the other defendants preferred an appeal to the Special Judge, who reversed the Settlement-officer's decision. The plaintiffs then sued in the Civil Court for a declaratory decree of their rights as tenants with a right of occupancy. It was ruled that the Special Judge's decision did not operate as *res judicata*, as it merely decided the question as between tenant and tenant.—Mohant Jugannath *v.* Chunder Kumar, 5 C. W. N., 421.

Revenue-officer's decision.

In a suit brought by the zemindar for rent the raiyats had alleged that the amount of rent and the extent of land had been over-stated by the plaintiff; but the Court had decided that the defendants were bound by a jamabundi signed by them, and refused to try the question whether the extent of land had been over-stated. In a subsequent suit by the raiyats against the zemindar, praying for measurement of certain lands and for a declaration of their yearly rental, the plea of *res judicata* was raised and it was held that the suit was not barred by *res judicata*.—Raghoonath *v.* Jugut Bundhu, I. L. R., 7 Cal., 214; 8 C. L. R., 393. Similarly, where in a suit for rent, the contention of the defendant was that he was not liable for the entire rent, as part of his land was in the plaintiff's possession, the Court raised no issues on the point, nor was any measurement made of the land; and, the defendant failing to prove his allegation, the suit was decreed. In a subsequent suit for arrears of rent of subsequent years, the defendant had the land measured, adduced evidence, and endeavoured to raise the same defence as before; and it was held that the matter was not *res judicata*, as in the previous suit the Court had not definitely determined the area of the land in the defendant's possession and the annual rent payable for the same.—(Nil Madhub

Area and measurement.

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v. Brojonath, I. L. R., 21 Cal., 236. The case is different when in a suit for a year's rent, the question of abatement was raised and determined between the parties.—Naba Durga *v.* Fyz Bux, 24 W. R., 403; I.L. R., Cal., 202. Where an issue was framed on the basis of the defendant's contention, and decided against him, the same question cannot be raised in a subsequent suit.—(Man Mohini Debi *v.* Binod Bihari Saha, 25 W. R., 10; Bassan Lal Sukal *v.* Chandi Das 4 C. L. R., 1; Niamat Khan v. Phadu Baldia, I. L. R.. 6 Cal., 319; 7 C. L. R., 227; Kartik Chandra Pal v. Sridhar Mandal, I. L. R., 12 Cal, 563; Radha Madhab Haldar v. Manohar Mukhurji I. L. R., 15 Cal., 756; I. L. R., 15 I. A., 97). So, when in a previous suit brought by the predecessor in title of the plaintiff against the defendants for rent, one of the questions raised was whether the land, in respect of which rent was claimed mâl or lakhiraj and that question was decided in favour of the defendants, and in a subsequent suit by the plaintiff against the same defendants for *khas* possession of certain land, the defence was that the land in dispute was their *lakhiraj* land, and that the judgment in the previous suit operated as *res judicata*, it was held that, though the previous suit was one for rent, yet the issue upon the question whether the land was mâl or lakhiraj was raised directly in the suit and, therefore, the subsequent suit was barred.—(Kasiswar Mukhopadhya v. Mohendro Nath Bhandari, I. L. R., 25 Cal., 136). But the decision of a question of title in a rent suit does not operate as *res judicata* in a subsequent suit for title, when such question of title was raised only incidentally in the rent suit.—(Srihari Banerji v. Khitish Chandra Rai, I. L. R., 24 Cal., 569; 1 C. W. N., 509; Alimudin Biswas v. Kafiludin 2 C. W. N., cxlvii). If the matter at issue in a previous suit ought to have been, but was not raised in a previous suit, it is *res judicata*.—Dinamayi Debi v. Anango Mayi, 4 C. L. R., 599; Ghursobhit Ahir v. Ram Datta Singh, I. L. R., 5 Cal., 923; 6 C. L. R., 537; Bhairab Dyal Sahu v. Sahadeb Poddar, 1 C. W. N., cci). But in Kailash Mandal v. Baroda Sundari Dasi, I. L. R., 24 Cal., 711; 1 C. W. N., 565, a defendant was held entitled to raise the plea of *benami*, notwithstanding that it was not raised in the previous suit. A judgment which decided merely questions of rent, and which was pronounced by in a Court not having jurisdiction to decide the question of title to the property, cannot be regarded as amounting to *res judicata* a subsequent suit brought to decide the question of title to that property.—Raja Khettur Krishta *v.* Kumar Dinendra Narain, 3 C. W. N., 20; see also Janesvur Das v. Gulzari Lal, 11 W. R., 216; Chunder Kumar v. Numni Khanum, 19 W. R., 322. A decision in a suit for rent, brought by a plaintiff against a person who is alleged to have been his tenant in respect of certain land, does not operate as *res judicata* in a subsequent suit brought by the same plaintiff for establishment of his title to the land, not only against the alleged tenant, but also against the person whose title as landlord the tenant defendant had set up in the rent-suit.—Dwarkanath v. Ram Chand Aitch, I. L. R., 26 Cal., 428; 3 C. W. N., 266. Gopal Das v. Gupi Nath, 12 C. L. R., 38 dissented from. A decree obtained in a previous suit for rent by an *ijaradar* does

Abatement.

Mal or lakhiraj.

Question of title.

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not operate as *res judicata* against the tenant on the question whether the relationship of landlord and tenant exists in a subsequent suit for rent brought by the superior landlord.—Baloram Mundle v. Kartik Chunder, 4 C. W. N., 161. If the question for consideration in the subsequent suit is not the same as that in the previous suit, or if the matter in issue in the former suit has not been heard and finally decided, there is no *res judicata*—Brindabun Chunder v. Dhananjai, 4 C. L. R., 443; Raghunath *v.* Jogatbuudhu, 8 C. L. R., 393.) But if the parties are the same, and the self-same title is substantially in issue in both suits, the second suit is barred.—Mohima Chunder v. Assadha, 1 W. R., 207; Gobinda Chunder v. Taruk Chunder, I. L. R. 3 Cal., 145, 1 C. L. R. 35, F.B.; Bamasundari v. Punchanun, I. L. R., 3 Cal., 705; see also Topinidu Dhiraj Gir Gosami v. Srepaty Sahanu, I. L. R., 5 Cal., 832. There is nothing in section 13 of the Code of Civil Procedure to indicate that the judgment in the two suits must be open to appeal in the same way in order that the decision upon any issue in the earlier suit may bar the trial of the same issue in the later suit.—Raichuran v. Kamud Mohan, I. L. R., 25 Cal., 571, 2 C. W. N., 297.

Power to modify Code of Civil Procedure in its application to landlord and tenant suits.

143. (*1*) The High Court may, from time to time, with the approval of the Governor-General in Council, make rules, consistent with this Act, declaring that any portions of the Code of Civil Procedure shall not apply to suits between landlord and tenant as such or to any specified classes of such suits, or shall apply to them subject to modifications specified in the rules.

XIV of 1882.

(*2*) Subject to any rules so made, and subject also to the other provisions of this Act, the Code of Civil Procedure shall apply to all such suits.

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Resjudicata:—See s. 13 of the Civil Procedure Code and notes at p.p 457-60 under the head of *res judicata*—*Ante.*

Effect of s. 43 of the Civil Procedure Code:—Under sections 42 and 43 of the Civil Proeedure Code, plaintiff must bring entire claim and every remedy enforceable in respect of that claim into Court at once and if he fails to do that in any suit he cannot afterwards avail himself of any remedy on which he has not chosen to insist in the first suit. A plaintiff is therefore bound to sue for all rent due at the time of the institution of his suit. He cannot sue for the rent of one year, and then sue later on for the arrears of earlier years, (see illustration to sec. 43), or for the arrears of later years, if the rent of these years was due at the time of the institution of his suit—Tarak Chandra Mukherji v. Panchu Mohini Debya, I. L. R., 6 Cal., 791; 8 C. L. R., 297; affimed by Privy Council; Madho Prokash Singh v. Murli

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Manohar, I. L. R., 5 All., 406 F. B.; Narain Kumari v. Raghu Mahapatro, I. L. R., 12 Cal., 50; Alagu *v.* Abdulla I. L. R., 8 Mad., 147; Balaji Sitaram Naik Salgavkar *v.* Bhikaji Soyare Prabhu Kanolekar, I. L. R., 8 Bom., 164; Chandi Charan Tarafdar *v.* Jogendro Chandra Chaudhri, 1 C. W. N., cxx; Ahsanulla Khan v. Tirthobashini, I. L. R., 22 Cal., 691; see also sheo Shankar Sahai v. Hridai Narain I. L. R., 9 Cal,, 143; and Madan Mohan Lal v. Sheo Shankar Sahai, I. L, R., 12 Cal., 482. But the dismissal of a suit for enhancement of rent is under sec. 43, C, P. C., no bar to a subsequent suit for rent at the rate originally fixed.—Sadarudin Ahmed v. Beni Madhub Rai, I. L. R. 15 Cal., 145. F. B., overruling Kanak Chandra v. Goura Das I. L, R., 9, Cal., 919; 12 C. L, R, 919; see also Khedarunnissa v, Budhi, 13 W, R,, 31; and Sura Sundari Debi v. Ghulam Ali, 19 W, R., 142 15 B. L. R., 125, note).

Set off:—See s. 111 of the Civil Procedure Code. Though the provisions of the Civil Procedure Code do not contemplate that rent should be set-off against the plaintiff's claim in a suit for the recovery of money, they do not take away from parties any right to set-off, legal or equitable, which they would have independently of that Code.—Bhagabut Panda *v.* Bamdeb Punday, I. L. R., 11 Cal., 557; Clark v. Ruthnavalao Chetti, 2 Mad,, H. C., 296; Kishore Chand v. Madhowji Vekam I. L. R., 4 Bom,, 467. When the defence raised a cross-demand which is found to arise out of the same transaction as and is connected in its nature with the plaintiff's suit, the defendant is entitled to have an adjudication of it, although it may not amount to a set-off under section 111 of the Code of Civil Procedure.—Chisholm v. Gopal Chunder Surma, I. L. R., 16 Cal., 711; see also Watson & Co. v. Brojo Soonduree Debia, 16 W. R,, 225. To admit of a set-off, there must be such a connection between the claim and the counter claim that the truth and completeness of the one cannot be judged of or measured without refernce to, and, consideration of the other. A *darputnidar* is entitled to set-off against the *patni* rent sums paid by him to save the *patni* from sale under Regulation VIII of 1819.—Nobo Gopal v. Srinath I. L. R., 8 Cal., 877; Lalit Mohun v. Srinibas I. L. R., 13 Cal., 331. See also on the subject of set-off.—Rookminy Bullub v. Mulk Jamania, I. L. R., 9 Cal., 914: 12 C., L. R., 534. Where there is no such connection between the claim of the plaintiff and the counterclaim of the defendant, it was held that the defendant was not entitled, as a matter of equity, apart from legislative enactment, to a set-off.—Hossena Bebee v. Smith 22 W. R., 15; 13 B. L. R., 440. But an allegation of payment must not be confounded with a plea of set-off.—Koonjo Behary v. Nilmoney, 4 Cal., L. R., 296.

The Civil Procedure Code shall apply to all such suits:—An application under s. 93 is not a suit within the meaning of s. 143.—Hossain v. Mutookdharee, I. L. R. 14 Cal., 312. Proceedings under s. 103 of the former Chapter X were held to be suits between landlord and tenant within the meaning of s. 143 by virtue of the rules framed under s. 189.— Acha Mian v. Durga Charan, I. L. R., 25 Cal., 146; 2 C. W. N., 137.

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144. (1) The cause of action in all suits between landlord and tenant as such shall, for the purposes of the Code of Civil Procedure, be deemed to have arisen within the local limits of the jurisdiction of the Civil Court which would have jurisdiction to entertain a suit for the possession of the tenure or holding in connection with which the suit is brought.

Jurisdiction in proceedings under Act.

XIV of 1882.

(2) When under this Act a Civil Court is authorized to make an order on the application of a landlord or a tenant, the application shall be made to the Court which would have jurisdiction to entertain a suit for the possession of the tenure or holding in connection with which the application is brought.

Pecuniary limit:—Neither of the sub-sections provides for the pecuniary limit. They only give us rules for the local jurisdiction. This section should therefore be read with the Bengal Civil Court's Act which prescribes Rs. 1, 000 to be the pecuniary limit of the Munsiff, the Subordinate Judge and the District Judge taking cognizance of the suits when value of the property exceeds Rs. 1,000. The pecuniary limit is, however, to be determined by the value of the tenure or holding and not by its rental; and the mode of computing the value of the subject-matter of a suit, as provided by Act VII of 1870, applies only to determining the Court-fee to be paid, and not to the question of jurisdiction.—(Jubraj Sing *v.* Inderjeet Mahaton, 18 W. R., 108; Nanhoon Sing *v.* Toofani Sing, 20 W. R., 33; Chander Nath Bhattacharji *v.* Brindabun Shaha, 25 W. R., 39.) Hence the question whether a Munsiff has jurisdiction or not does not depend upon the amount of the Court-fees to be paid but upon the actual market value of the tenure or holding. A suit for recovery of rent due on a tenure for a sum not exceeding Rs. 1,000 is cognizable in a Munsif's Court although a suit for recovery of possession of the tenure lies in a Sub-Judge's Court, the capital value of the tenure being Rs. 4,500:—Chowdhury Eazlur Rahim *v.* Dwarka Nath, 7 C. W. N., 402. S. 144 lays down where the cause of action in suits between landlord and tenant shall be deemed to have arisen; it does not say in which Court the suit is to be instituted; for this purpose that section is to be read with ss. 15 and 17 of the Civil Procedure Code.—*Ibid.*

Suits between landlord and tenant:—The operation of this section is confined to suits between landlord and tenant.—Hossain *v.* Mutookdharee, I. L. R., 14 Cal., 312. Because a suit is one between a landlord and a tenant it does not follow that it is therefore cognizable by ordinary Civil Courts as distinguished from Courts of Small Causes:—Rango Roy *v.* Frederick Halloway, 4 C. W. N., 95: I. L. R., 26 Cal., 842. This section has no bearing upon the question of the nature of the suit; it determines the jurisdiction within which suits are to be instituted.—*Ibid.* A suit under s. 75 for the recovery of a sum which the plaintiff, the tenant of the defendant, claims in respect of excess payments made by him in respect of the rent of his holding, is cognizable by the Small Cause Court, although it is a suit between landlord and tenant.—

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Ibid. Therefore, where the suit involves a sum below Rs. 500, there would be no second appeal under section 586 of the Code.—*Ibid.* A suit brought by an assignee of a landlord for recovery of arrears assigned after they fell due is a "suit for the recovery of rent," and therefore excepted from the cognizance of the Court of Small Causes.—Grish Chunder *v.* Nachim Kazi, I. L. R., 27 Cal., 827; 4 C. W. N., 357 F. B., Banerji, J., dissenting. Plaintiff executed a lease for nine years in favour of the defendant No. 1 at an annual rent of Rs 1, 400 payable by fixed instalments, and they received Rs. 700 from the defendant by way of security for due performance of the conract; the defendant under the direction of the plaintiffs paid from time to time Government revenue, public cesses, cost of embankments, expenses of litigation &c., on behalf of the plaintiffs and used to set-off those amounts against the rent due to them under the lease; and the defendant never received any money from the plaintiff by way of advance or otherwise: Plaintiffs instituted a suit for an account in respect of the leased property alleging that there was a relationship of principal and agent between the parties; *held* that a suit for an account did not lie but the remedy lay in a suit for rent.—Bhekdhari v. Badhsingh, I. L. R., 27 Cal., 663.

Suit for rent of fishery:—A suit for the rent of a *julkur* or fishery would be brought in the Court which would have jurisdiction to entertain a suit for the possession of the fishery.—Shibu Haldar *v.* Gopi Sundari, 1 C. W. N lxxxvii.

Suit for rent of homestead or bastu land:—Suits for recovery of rent other than house-rent, are excluded from the jurisdiction of the Small Cause Court. That Court has, therefore, now no jurisdiction to entertain a suit for arrears of rent of homestead or bastu land.—Uma Churun v. Bijari Bewa, I. L. R., 15 Cal., 174.

Court-fees:—Clause 11 of s. 7 of the Court-fees' Act, however, gives the rules for determining the amount of Court-fee payable in suits. That clause runs thus:—

"In the following suits between landlord and tenant:

(*a*) for the delivery by a tenant of the counterpart of a lease,

(*b*) to enhance the rent of a tenant having a right of occupancy,

(*c*) for the delivery by a landlord of a lease,

(*d*) to contest a notice of ejectment,

(*e*) to recover the occupancy of land from which a tenant has been illegally ejected by the landlord and

(*f*) for abatement of rent:

according to amount of the rent of the land to which the suit refers, payable for the years next before the date of presenting the plaint."

Naibs or gumashtas to be recognized agents.

145. Every *naib* or *gomashta* of a landlord, empowered in this behalf by a written authority under the hand of the landlord, shall, for the purposes of every such suit or application, be deemed to be the recognized agent of the landlord within the meaning of the Code of Civil Procedure, notwithstanding that the landlord may reside within the local limits

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of the jurisdiction of the Court in which the suit is to be instituted or is pending, or in which the application is made.

Written authority how stamped:—The written authority empowering the naib or gomashta to appear, act or apply for the principal requires to be stamped, under art. 50, Sched, I of Act 1879 as follows:—

"(*a*)	When executed for the sole purpose of procuring the presentation of one or more documents for registration, in relation to a single transaction	Eight annas.
"(*b*)	When authorizing one person or more to act in a single transaction other than that mentioned in (*a*)	One rupee.
"(*c*)	When authorizing not more than five persons to act jointly and severally in more than one transaction or generally ...	Five rupees.
"(*d*)	When authorizing more than five but not more than ten persons to act jointly and severally in more than one transaction or generally	Ten rupees.
"(*e*)	In any other case	One rupee for each person authorized.

"*Explanation*.—For the purposes of art. 50, more persons than one when belonging to the same firm shall be deemed to be one person."—(Raghunandan *v.* Ram Chandra 10 W. R., F. B., 39.)

When an instrument contains a several power-of-attorney conferred by two or more persons, it requires a seperate stamp for each power.—(In the matter of Jaye Kissen Mukerjee, *per* Garth, C. J., and Field and Wilson, JJ.; Board's Rev., Cir. December 1885, p. 108.)

Recognized agent:—"The recognized agents or parties by whom such appearances, applications, and acts, may be made or done are:—

(*a*) Persons holding general powers-of-attorney from parties not resident within the local limits of the jurisdiction of the Court within which the apperances, application or act is made or done; authorizing them to make and do such appearances, applications and acts on behalf of such parties.

(*b*) Muktars duly certificated under any law for the time being in force, and holding special powers-of-attorney authorizing them to do on behalf of their principals such acts as may legally be done by muktars

(*c*) Persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which the appearance, application and act is made or done in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts. (S. 37 Civil Procedure Code.)

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A naib or gumashta cannot grant lease or recognise transfer of holding:—It does not fall within the ordinary scope of the duties of a gumashta or a naib to grant pottas at fixed rate. Expres authority is necessary.—(Golukmani *v.* Assimuddin, 1 W. R., 56; Panchanan *v.* Piary Mohan, 2 W. R., 225; Annoda Prasad *v.* Chandra Sikhar, 7 W. R., 394.) It does not also fall within his ordinary scope to grant leases. Special authority is required.—(Abilash Rai *v.* Dalial, I. L. R., 3 Cal., 557; Tara *v.* Pina, 2 W. R., 155; Kali Kamal *v.* Anis, 3 W. R., Act X, 1). A gumashta cannot recognise the transfer of a holding and his receipt of rent to the transferee will not bind the landlord.—(Bhojohari *v.* Aka Ghulam, 16 W. R., 97.)

A naib or Gomashta cannot sue in his own name:—When a person sues on behalf of his principal under a power-of-attorney, the principal's name should appear as plaintiff.—Choonee Sukul *v.* Hur Pershad, 1 All., 277. By s. 24, Act VIII (B.C.) of 1869, the surbarakars and tehsildars might institue suits for rent, but the zemindar's name, and not their own names, must be entered as plaintiffs.—(Ladlee Pershad *v.* Gunga Prosad, 4 All., 59.) A gumashta or am-mooktear cannot bring a suit for rent in this own name.—(Kunj Bihary Roy *v.* Purno Chunder Chatterji, 12 C. L. R., 55.)

Special register of suits.
XIV of 1882.

146. The particulars referred to in section 58 of the Code of Civil Procedure shall, in the case of such suits, instead of being entered in the register of civil suits prescribed by that section, be entered in a special register to be kept by each Civil Court, in such form as the Local Government may, from time to time, prescribe in this behalf.

Special Register:—The Lieut.-Governor has directed that the special register to be kept by each Civil Court, in accordance with the provisions of this section, shall be in the form prescribed by section 58, Act XIV of 1882 and numbered as 116 in the 4th schedule to that Act (Cal. Gaz. March 3, 1886).

This provision is introduced obviously for statistical purposes, and not for the purpose of separating in two parts the jurisdiction exercised by one Court—(Jallalooddeen *v.* Major James Brown, 18 W. R., 99.) The question whether a suit is one under Act VIII of 1869 (B. C.) or not appears to be of the most frivolous character; and the mere fact of a suit being by some mistake of the office probably registered in the book of rent suits ought not to conclude plaintiff.—(Ram Narain Mitter *v.* Nobin Chunder Moordafarash, 18 W. R., 208.) There is no longer any such distinction as one side of the Court from another, Revenue and Civil—(Puriag Dutt Roy *v.* Fekoo Roy, 19 W. R., 160; Lala Bhugwan Sahai *v.* Sangesvar Chowdry, 19 W. R., 431; Gobind Mahton *v.* Ram Khelawan Singh, 22 W. R., 478).

Successive rent-suits

147. Subject to the provisions of section 373 of the Code of Civil Procedure, where a landlord has instituted a suit against a raiyat for the re-

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covery of any rent of his holding, the landlord shall not institute another suit against him for the recovery of any rent of that holding until after three months from the date of the institution of the previous suit.

"We have substituted for the section of the Bill No II, regulating the instalments in which rent is to be payable, the following simpler provisions, namely:—

'53. Subject to agreement or established usage, a money-rent payable by a tenure-holder or riayat shall be paid in four equal instalments falling due on the last day of each quarter of the agricultural year."

And to prevent raiyats being harassed by successive suits for arrears, when by agreement or custom, a larger number of instalments than four may be established, we have inserted in Chapter XIII, a section (147) enacting in effect that such suits shall not be instituted against a raiyat oftener than once in three months." (*Select Committee's Report.*)

In this provision the Legislature has adopted the principle enunciated in Taruk Chunder Mookerjee *v.* Pancho Mohini Dabi, 8 C. L. R., 297; I. L. R., 6 Cal., 791.

Section 373 of the Code of the Civil Procedure provides for the withdrawal of suits, with leave of the Court, and with liberty to bring a fresh suit for the subject-matter of the action which is withdrawn, in other words, on the same cause of action.

Procedure in rent suits.

148. The following rules shall apply to suits for the recovery of rent:—

(*a*) sections 121 to 127 (both inclusive), 129, 305 and 320 to 326 (both inclusive) of the Code of Civil Procedure shall not apply to any such suit:

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(*b*) the plaint shall contain, in addition to the particulars specified in section 50 of the Code of Civil Procedure, a statement of the situation, designation, extent and boundaries of the land held by the tenant; or, where the plaintiff is unable to give the extent or boundaries, in lieu thereof a description sufficient for identification:

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(*c*) the summons shall be for the final disposal of the suit, unless the Court is of opinion that the summons should be for the settlement of issues only:

(*d*) the service of the summons may, if the High Court by rule, either generally, or specially for any local area, so directs, be effected, either in addition to, or in substitution for, any other mode of

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service, by forwarding the summons by post in a letter addressed to the defendant and registered under Part III of the Indian Post Office Act, 1866;

XIV of 1866.

when a summons is so forwarded in a letter, and it is proved that the letter was duly posted and registered, the Court may presume that the summons has been duly served:

(*e*) a written statement shall not be filed without the leave of the Court:

(*f*) the rules for recording the evidence of witnesses prescribed by section 189 of the Code of Civil Procedure shall apply, whether an appeal is allowed or not;

XIV of 1882.

(*g*) the Court may, when passing the decree, order on the oral application of the decree-holder the execution thereof, unless it is a decree for ejectment for arrears:

(*h*) notwithstanding anything contained in section 232 of the Code of Civil Procedure, an application for the execution of a decree for arrears obtained by a landlord shall not be made by an assignee of the decree unless the landlord's interest in the land has become and is vested in him.

XIV of 1882.

Clause (a): Sections of Civil Procedure Code inapplicable:—Sections 121 to 127 of the Civil Procedure Code relate to the examination of parties by interrogatories, the mode of their service and the consequence of omission to answer. Section 129 relates to Court's power to order discovery of documents. Section 305 enables a Court to postpone a sale to enable the defendant to raise the amount of the decree by mortgage, lease or private sale of the property. Sections 320 to 326 relate to the transfer to the Collector for execution of decrees relating to immoveable property which the Local Government with the sanction of the Governor-General in Council may effect by notification in the official Gazette. From this clause as well as from sec. 143, it would appear that the provisions of the Civil Procedure Code relating to execution, including those of sec. 244, are applicable to decrees obtained under this Act. The provisions of sec. 244 apply to proceedings in execution of decrees under Act VIII of 1869, B. C., but not under Act X of 1859.—(Brajo Gopal Sarkar *v.* Basirunnissa Bibi, I. L. R., 15 Cal., 179).

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Clause (b):—Under the old law in suits for the recovery of rent, the extent and boundaries of the land held by the tenant would not seem to be material, except when the amount of rent recoverable depends on the area of the land and the rent is to be calculated at so much per bigha.—(Mahomed Ismail *v.* Dhandar Kishor Narain, 25 W. R., 39). Under the present law if either the landlord or the tenant desires to have the situation, quantity and boundaries of the subject of the tenancy determined, this can always be effected by an application under sec. 158. It has, however, been held that "in a suit for arrears of rent, where the plaintiff claims a certain rent as payable in respect of certain lands mentioned in the plaint, and the defendant denies the occupation of these lands at the rents alleged by the plaintiff, but admits that he holds other lands at different rents, the proper issue to be tried is whether the defendant holds the lands set forth in the plaint at the rent specified. Where the Court failed to try this issue the case was remanded for adjudication thereon. A simple issue as to whether the defendant hold the jamas set forth in the plaint under the plaintiff is not sufficient.—(Bhaichal Nasyo *v.* Shannayisi Mahomed, 1 C. W. N., 152). In Rash Dhari Gop *v.* Khakan Sigh, I. L. R., 24 Cal., 435, it was held that "from sec 148 (*b*) of the Bengal Tenancy Act it would seem to be necessary that in a suit for the recovery of rent the land in respect of which that rent is payable should be clearly defined." In a later case, however, it was laid down that in a rent suit, it is not absolutely necessary to give the extent and boundaries of the lands in respect of which rent is claimed, and that where there is difficulty in giving these particulars, it would be enough if a description sufficient for identification is given.—(Pizaruddin Lashkar *v.* Ambika Charan Mitra, 5 C. W. N., 121), But there is no provision in the Civil Procedure. Code authorising the dismissal of a suit on the ground that the land in dispute as described in the plaint cannot be identified.—(Jaladhar Mandal, 1 C. W. N., clxxxix. If the statement is not sufficent for identification, the proper procedure is to return the plaint for amendment under s. 53 of the Code. In case of the plaintiff's failure to do so, it may be dealt with under s. 54.—Kazim v. Danish, 1 C. W. N., 574; Krishnaya Navada *v.* Panchu, I. L. R., 17 Mad., 187). The provision of cl. (*b*) seems, however, to be imperative.

Clause (c):—In suits for simply *recovering rent* the summons as usual is for the final disposal of the suit. When it is a suit for enhancement of rent, ordinarily the summons should be for settlement of issues, and so in suits for damages or ejectment. High Court Circular No. 372 of the 4th February, 1871, issued under the provisions of Act VIII, (B. C.) of 1869, directs that no suit for arrears of rent is to be proceeded with *ex parte* until after expiry of 14 days from the date of the service of the summons.—(High Court's Circular Orders, Civil Chap. I, p. 53).

Clause (d). Service of summons by post:—The High Court has not yet framed any rule for the service of the summons by post. Unless ruled by the High Court, the Courts cannot adopt this mode of service. The presumption is the same as that in cl. (*f*) of s. 114 of the Evidence Act. But suppose the letter is posted but not

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registered, will the presumption arise? Under the Evidence Act it would, but under Act VIII of 1862 B. C., it would not. See 16 W. R., 223; I. L. R., 15 Cal., 681.

Clause (e):—Under section 110 of the Code of Civil Procedure a defendant is entitled to put in a written statement at any time before or at the first hearing of the suit. A written statement filed at the first hearing does not require a Court-fee stamp.—(Cherag Ali *v.* Kadir Mohamed, 12 C. L. R., 367; Nagu *v.* Yeknath, I. L. R., 5 Bom., 400.) A written statement called for by the Court after the first hearing is also exempt from Court-fee.—See section 19, cl. (iii), of Act VII of 1870 (the Court-fees Act).

Clause (f):—Section 189 of the Civil Procedure Code provides: "In cases in which an appeal is not allowed, it shall not be necessary to take down the evidence of the witnesses in writing at length; but the Judge, as the examination of each witness proceeds, shall make a memorandum of the substance of what he deposes, and such memorandum shall be written and signed by the Judge with his own hand, and shall form part of the record."

Clause (g):—This section only applies to cases in which the decree-holder wishes to have immediate execution.—(Anonymous case, 9 W. R., 174). A debtor is not entitled to immunity from arrest until he has had a reasonable time to return home.—(De Pennings *v.* Moitro, 9 W. R., 349). The section is so indefinitely worded that it seems that the Court may order execution against persons and property simultaneously. The power ought, however, to be exercised with discretion, and the Court may refuse execution against person and property at the same time.—(Davis *v.* Middleton, 8 W. R., 282); only execution against immoveable property by way of ejectment is saved from this summary power.

Clause (h):—Section 232 of the Civil Procedure Code provides: "If a decree be transferred by assignment in writing, or by operation of law, from the decree-holder to any other person, the transferee may apply for its execution to the Court which passed it; and, if that Court thinks fit, the decree may be executed in the same manner and subject to the same conditions as if the application were made by such decree-holder: Provided as follow:—

(*a*) Where the decree has been transferred by assignment, notice in writing of such application shall be given to the transferor and the judgment-debtor, and the decree shall not be executed until the Court has heard their objections (if any) to such execution:

(*b*) Where a decree for money against several persons has been transferred to one of them it shall not be executed against the others."

The fact that an assignment of a decree for arrears of rent was made before the Tenancy Act will not protect from the provisions of s. 148 (*h*) an assignee who proceeds to execution afterwards.—(Ranjit Singh *v.* Mahabir Koer, I. L. R., 3 Cal., 663); but execution cannot be refused where, before that Act came into force, the assignment had been recognised by a Court of execution under s. 232 of the Civil Procedure Code.—(Kailas Chunder *v.*

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Jadunath, I. L. R., 14 Cal., 380). When a decree for rent had been passed before the passing of the Bengal Tenancy Act, and had been assigned to a *benamidar* after the passing of the Act, and the assignee, in execution of the decree, purchased some of the properties belonging to the judgment-debtors, it was held that the sale did not pass any title to the purchaser. "Though the decreewas passed under the former Rent Act, the assignment of the decree and the application for execution by the assignee having been made after the Bengal Tenancy Act came into operation, clause (*h*) of section 148 of that Act must apply to the execution proceedings; and the sale upon such an application, which is prohibited by that clause, must be held to be no sale under the Rent Law."—Shoshi Bhosan *v.* Gogon Chandra, I. L. R., 22 Cal., 364; Dinanath *v.* Golap, 1 C. W. N., 183. "The vesting of the landlord's interest may be by operation of law as in the case of devolution by right of inheritance.—Uma Sundri *v.* Brajanath I. L. R., 16 Cal., 345. And a manager of the estate of a minor appointed by the Court of Wards in whom the property has becom vested would be entitled to execute a decree obtained by a person who had been in possession of the property as executrix under a will the *factum* of which was not proved.—*Ibid.* The word "assignee," as used in this clause, does not include persons in whom a legal estate has vested by an act of the owner, but who have no independent interest in the property.—(Chhatrapat Sing *v.* Gopi Chand, I. L. R., 26 Cal., 750; 4 C. W. N., 446.) The interest acquired by the assignee must be the interest of the person obtaining the decree. Where an *ijaradar*, upon the expiration of his lease, assigned to his superior landlords a decree for rent, it was held that, as the interest of the assignor *qua ijaradar* had not vested in the assignees, they were not entitled to execute the decree.—(Dwarka Nath *v.* Peari Mohan, 1 C. W. N., 694.) This clause imposes a limitation upon the execution of a decree for rent and therefore it should be interpreted strictly and should not be extended to any person who does not come properly within its provisions.—(Nagendra v. Bhuban Mohan, 6 C. W. N., 91.) A decree obtained in a suit for rent brought by a landlord who ceases to have interest in the land during the pendency of the suit, is not a decree for rent and the provisions of cl., (*h*) of this section do not apply to such a decree.—(Nagendra *v.* Bhuban Mohan, 6 C. W. N., 91;) when therefore such a decree is assigned by the decree-holder and is afterwards re-assigned to him this clause is no bar to the execution of the decree.—*Ibid.* Where a landlord after obtaining a decree for arrears of rent, loses his interest in the estate, he is no longer the landlord and ss. 65 and 66 will no apply to the execution of such a decree.—Hem Chnder v. Monmohini, 3 C. W. N., 604.—The provisions of this Act do not apply to a decree for rent obtained by an assignee of the arrears.—(Mahendra Nath *v.* Kailas Chandar, 4 C. W. N., 605,) unless the assgnee of a rent-decree has the landlord's interest in the land he cannot execute it.—Dina Nath v. Golak Mohini, 1 C. W. N., 183); where during the pendency of a suit for rent plaintiff sold his interest in the mehal to a certain person and subsequently sold to him the

Interst how vested.

Meaning of "assignee."

This clause does not apply to money decree and should be strictly interpreted.

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decree for rent, *held* that the rent-decree if assigned under s. 232, ceased to be a rent-decree and became an ordinary civil demand.—*Ibid.* A decree for arrears of rent obtained by the landlord against a defaulting tenant as having accrued due between the date of the sale of the tenure in execution of a previous decree for arrears of rent and the date of confirmation of such sale is a decree for rent and an application for execution by the assignee of such a decree is barred by this clause.—Karuna Moyee *v.* Surendra Nath Mukerjee, I. L. R. 26 Cal., 172. Whether a purchaser of a portion of an occupancy-holding has a valid interest as against the landlord or not he has such an interest in the holding as against the tenant as entitles him to make a deposit under section 310A of the Code of Civil Procedure, in order to have a sale of the holding in execution set aside.—Kunja Bihari *v.* Sambhu Chunder, 8 C. W. N., 232.

149. (1) When a defendant admits that money is due from him on account of rent, but pleads that it is due not to the plaintiff but to a third person, the Court shall, except for special reasons to be recorded in writing, refuse to take cognizance of the plea unless the defendant pays into Court the amount so admitted to be due.

(2) Where such a payment is made, the Court shall forthwith cause notice of the payment to be served on the third person.

(3) Unless the third person, within three months from the receipt of the notice, institutes a suit against the plaintiff, and therein obtains an order restraining payment out of the money, it shall be paid out to the plaintiff on his application.

(4) Nothing in this section shall affect the right of any person to recover from the plaintiff money paid to him under sub-section (3).

Section (1): Intervenor.—The object of this section was to prevent tenants being harassed where disputes arise between rival claimants to the land in respect of which the rent is due, and consequently whether the dispute between such third parties is a dispute as to title, or a dispute as to possession only, they are at liberty to have that tried, and in the suit in which that is being tried to obtain the injunction which is mentioned in sub-sec. 3 of s. 149 of the Act.—Rubiunnessa *v.* Gooljan Bibee, I. L. R., 17 Cal., 829. This section seems to have adopted the rule laid down in Lodai Mullah *v.* Kali Das Rai, (I. L. R., 8 Cal., 238; 10 C. L. R., 581) that where a person sued for rent sets up the title of a third party, and alleges that he holds under, and pays rent to, him, such third party ought not to be made a party to the suit, so as to convert a simple suit for arrears of rent into one for the determination of the title to the property in respect of which the rent is claimed. "Such a suit raises only two issues, —*viz*, (1) Does the relation of landlord and tenant exist between the plaintiff and

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defendant ? (2) Are the alleged arrears of rent due and unpaid? And these are questions in which the plaintiff and defendant are alone concerned and no third party claiming a title adverse to the plaintiff, can properly be made a party to the trial of these issues."

Subsection (2). Service of notice :—The notice should be served in the mode prescribed by rule 3, Chapter I of the Government rules. See Appendix.

Subsection (3). Institutes Suit.—A suit by a third person under cl. 3 of s. 149 of the Bengal Tenancy Act is not a title suit and need not be stamped as such. *Per* Tottenham, J.: "Such suit is in the nature of a suit for an injunction under the Specific Relief Act or else declaratory suit." Norris, J.,—"I agree that the suit in question is not a title suit. I do not think it is necessary to express any opinion as to what sort of suit it is."—(Jagadamba Devi *v.* Protap Ghosh, I. L. R., 14 Cal., 537.) The object of s. 149 of the Bengal Tenancy Act is to prevent tenants being harassed when disputes arise between rival claimants of the land in respect of which the rent is due. In a suit, therefore, under cl. (3) of s. 149 the plaintiff is entitled to have the question of the title as well as that of possession tried, and to obtain the injunction therein mentioned. Jagadamba Devi *v.* Protap Ghosh, I. L. R., 14 Cal., 537, referred to and explained.—(Rubiun Nissa *v.* Gooljan Bibi, I. L. R., 17 Cal., 829.) A suit brought under s. 149 cl. (3) in which the plaintiff claims the right to receive rent by reason of his being in possession of the land (as shown by the receipt of rent for a reasonably sufficient period) is maintainable, though the decision of the suit may or may not ultimately rest on the question of possession merely, without reference to the question of title. The question of possession should be tried first in the suits and the suit dismissed if that question be decided against the plaintiff as he does not rely on his title ; but if decided in the plaintiff's favour, the defendant would be put to the proof of his title and the question of title would have to be tried. Rubiun Nisa *v.* Guljan Bibi, I. L. R., 17 Cal., 829, referred by Jadub Lal Roy Chowhury *v.* Sree Khemankari Debya, 8 C. W. N., 248. A suit contemplated by this section is a suit with reference to the money deposited in Court and for an injunction restraining the paying out of the money. The section does not contemplate a suit for establishment of the relationship of landlord and tenant between the parties.—Horananda Banerjee *v.* Ananta Dasee 9 C. W. N., 492.

Limitation.—For limitation of suits brought under sub-section (4), see art. 109 of Schd. 11 of the Indian Limitation Act.

Payment into Court of money admitted to be due to landlord.

150. When a defendant admits that money is due from him to the plaintiff on account of rent, but pleads that the amount claimed is in excess of the amount due, the Court shall, except for special reasons to be recorded in writing

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refuse to take cognizance of the plea unless the defendant pays into Court the amount so admitted to be due.

Section 150 of the Bengal Tenancy Act is highly penal in its character and cannot be put in force against a defendant, unless he has intentionally admitted money to be due and has not paid it; and such admission must be in the action. Under the circumstances of this case it was held that the defendant had made no such admission.—(Ali Ahammad Sirdar v. Bepin Behari Bose, I. L. R., 20 Cal., 595.)

The section is limited to cases in which the plea of the tenant is one in respect of which the burden of proof lies upon him; in other words, where it is a plea of confession and avoidance. The section therefore does not apply to a case in which the rate of rent is in dispute.—(Baranasi Pershad v. Makhan Roy, I. L. R., 30 Cal., 947.)

Provision as to payment of portion of money.

151. When a defendant is liable to pay money into Court under either of the two last foregoing sections, if the Court thinks that there are sufficient reasons for so ordering, it may take cognizance of the defendant's plea on his paying into Court such reasonable portion of the money as the Court directs.

Court to grant receipt.

152. When a defendant pays money into Court under either of the said sections, the Court shall give the defendant a receipt, and the receipt so given shall operate as an acquittance in the same manner and to the same extent as if it had been given by the plaintiff or the third person as the case may be.

Appeals in rent-suits.

153. An appeal shall not lie from any decree or order passed, whether in the first instance or on appeal, in any suit instituted by a landlord for the recovery of rent where—

(*a*) the decree or order is passed by a District Judge, Additional Judge or Subordinate Judge, and the amount claimed in the suit does not exceed one hundred rupees, or

(*b*) the decree or order is passed by any other judicial officer specially empowered by the Local Government to exercise final jurisdiction under this section, and the amount claimed in the suit does not exceed fifty rupees;

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unless in either case the decree or order has decided a question relating to title to land or to some interest in land as between parties having conflicting claims thereto, or a question of a right to enhance or vary the rent of a tenant, or a question of the amount of rent annually payable by a tenant:

Provided that the District Judge may call for the record of any case in which a judicial officer as aforesaid has passed a decree or order to which this section applies, if it appears that the judicial officer has exercised a jurisdiction not vested in him by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of his jurisdiction illegally or with material irregularity; and may pass such order as the District Judge thinks fit.

Suit.—Tne word "suit" in this section includes all proceedings prior or subsequent to a decree.—Kristo Chunder Chuckerbutty *v.* Anund Coomar Dutt, 19 W. R., 307; Kedarnath Bisvas *v.* Huro Prosad Roy Chowdry, 23 W. R., 207; Parbati Churun *v.* Mundari, I. L. R., 5 Cal., 594; and therefore no second appeal lies against an order made in the course of execution unless it fulfils the same conditions.—Shyama Churan *v.* Debendranath, I. L. R., 27 Cal., 484; 4 C. W. N., 269. It follows that no appeal lies from an order passed by a District Judge setting aside a sale in execution of a decree for rent valued at less than Rs. 100.—Monmohini *v.* Lakhi Narain, I. L. R., 28 Cal., 116. The word "proceedings," in s. 6 of Act I of 1868, as applied to a suit, means the suit as an entirety, that is, down to the final decree. A second appeal, therefore, to the High Court, on a question of the amount due as rent will not lie when the suit was instituted previous to the passing of Act VIII of 1885, although the judgment in the suit was delivered, and the first appeal therefrom heard, subsequently to the passing of that Act. Hurrosundari Debi *v.* Bhojohari Das Manji, I. L. R., 13 Cal., 86, approved.—Satghuri *v.* Mujidan I. L. R., 15 Cal., 107.

Order:—The word "order" in section 153 does not mean merely a final order; it includes interlocutory orders otherwise appealable; *e. g.*, an order of remand in a suit for rent in which the claim does not exceed Rs. 100, unless it decides any of the questions mentioned above.—Gagan Chand *v.* Casperz, 4 C. W. N., 44; Batasan *v.* Jaiti, 3 C. W. N., lxii. Orders made in execution of decrees passed in suits of the nature cognizable by Courts of Small Causes the value of which does not exceed Rs. 500 have been held to be non-appealable by virtue of the provisions of s. 586, C. P. C. See Lalla Khanda Pershad *v.* Lalla Lal Behary, I. L. R., 25 Cal., 872; Anund Chunder *v.* Sidhy Gopal, 8 W. R., 112; Dendoyal *v.* Patra Khan, 18 All. 481.

District and Additional Judge.—The expressions "District Judge, Additional Judge, or Subordinate Judge" are in accordance with the Full Bench decision of

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Brojo Misser *v.* Alhadi Misrain, 13 B. L. R., 376; 21 W. R., 320; as well as with the Civil Courts Act. This Act gives a jurisdiction to try suits according to the Code of Civil Precedure, except where it is otherwise provided by the Act, and this section has a qualifying effect, and provides that there shall be no special appeal in rent-suits under Rs. 100, except in certain circumstances.—Poorno Chunder Roy *v.* Kristo Chunder Singh, 23 W. R., 171. In a later case it was doubted by Mr. Justice Jackson, if s. 102 of Act VIII of 1869 (B. C.) took away the right of special appeal given by the Civil Procedure Code in such cases, and if the Bengal Council had authority to take away the powers of the High Court to entertain special appeals. The Full Bench, however, decided that in view of a long course of decisions no second appeal will lie under s. 102 except under the special circumstances mentioned therein.—Lungessur Koer *v.* Sookha Ojha, and Radhay Kishen v. Kali Misser, I. L. R., 3 Cal., 151. The objection of Mr. Justice Jackson does not hold water under the present law which makes the Civil Procedure expressly subject to the new provisions and which is an India Council Act. The words "judicial officer as aforesaid" mentioned in the proviso to sec. 153 have reference to the "Judicial Officer" spoken of in clause (*b*) of the section, and to such officer only. It follows that the District Judge possesses no revisional jurisdiction by virtue of that proviso in respect of the decrees and orders of a District Judge, Additional Judge, or Subordinate Judge referred to in clause (*a*) of the section.—Sankar Mani Devi v. Mathura Dhupini, I. L. R., 15 Cal., 327. An Additional Judge has no revisional powers under the proviso; for the section makes a distinction between a District Judge and an Additional District Judge.—Gaudna *v.* Jabanulla, 5 C. W. N., xlviii).

High Court's powers of revision:—The High Court can, in a case in which no second appeal lies, interfere under sec. 622, C. P. C., and set aside the order of a District Judge in a suit for arrears of rent, when the District Judge has acted illegally in the exercise of his jurisdiction.—Jagabandhu Patak *v.* Jadu Ghosh Alkushi, I. L. R., 15 Cal., 47. Where a District Judge acted in contravention of the powers vested in him by the proviso to s. 153 of this Act by interfering with the judgment of the Munsiff on a question of law, the District Judge acted without jurisdiction and the High Court can revise his order.—Harananda Banerjee *v.* Ananta Dasi 9 C. W. N., 492.

Bar to appeal:—The provisions of this section apply only to suits for the reeovering of rent; so that an appeal will lie under sec. 540, C. P. C., in all other classes of suits under the Tenancy Act, as well as in suits for the recovery of rent in which any of the questions referred to in the section have been decided. The bar to an appeal depends on two facts, (1) the amount of the claim in the suit, and (2) the nature of the decree made in the action. But, in order to give rise to the bar, the suit must be one between the landlord and tenant.—Kalinath *v.* Kefatulla, 1 C. W. N., cxix; Mohendra *v.* Kailash 4 C. W. N., 605. A suit for back rents by an assignee from the previous landlord does not come under section 153. Nor does the section apply where the claim, though nominally for rent, is in reality for mesne profits or damages.

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—Chandi Charan *v.* Jogendra, 1 C. W. N., cxx. No appeal lies against an order passed by a Civil Court under section 84.—Goghan Mollah *v.* Rameshar Narain Mahta, I. L. R., 18 Cal., 271; Piari Mohan Mukherji v. Baroda Charan Chakravartti, I. L. R., 19 Cal., 485; from an order under sec. 91 directing tenants to attend and point out boundaries of land to be measured.—Daya Ghazi v. Ram Lal Sukul, 2 C. W. N., 351, from an order rejecting an application under sec. 93 of this Act for the appointment of a common manager.—Hossain Baksh v. Mutukdhari Lal, I. L. R., 14 Cal., 312; from an order under sec. 173 of this Act setting aside a sale.—Raghu Singh v. Misri Singh, I. L. R., 21 Cal., 825; or from an order under sec. 174 of this Act or sec. 310 A., C. P. C., setting aside a sale.—Kishori Mohan Rai v. Saroda Mani Dasi, 1 C. W. N., 30; Bansidhar Haldar v. Kedar Nath Mandal, 1 C. W. N., 114.

Second appeals:—Where the amount claimed in the suit does not exceed Rs. 100 or Rs. 50, having regard to the provisions of clause (*a*) and (*b*) respectively, a secod appeal will lie only if the decree or order has decided (1) a question relating to title to land or to some interest in land as between parties claiming adversely to each other, or (2) a question of a right to enhance or vary the rent, or (3) a question relating to the amount of rent payable by a tenant. The 3rd of these conditions is an innovation; the 1st and 2nd have been reproduced from s. 102 of Act VIII of 1869 B. C. Where the claim exceeds Rs. 100 [in the cases referred to in clause (*a*)] or Rs. 50 [in the case referred to in clause (*b*)] a second appeal is not barred. When a second appeal does lie, either in consequence of the value of the suit or of the nature of the decree, it is subject to the section 584 of the Code of Civil Procedure which provides for a second appeal on the ground (*a*) of the decision being contrary to some specified law or usage having the force of law; (*b*) of the decision having failed to determine some material issue of law or usage having the force of law; and (*c*) of a substantial error or defect in the procedure, which may possibly have produced error or defect in the decision of the case on the merits. A second appeal will lie from an order under sec. 173 of this Act setting aside a sale, when the auction-purchaser is a *benamidar* for the judgment-debtor and where, therefore, the application for setting aside the sale is really one under sec. 224, C. P. C.—Chand Mani Dasi v. Santo Mani Dasi, I. L. R., 24 Cal., 707; 1 C. W. N., 534. An objection as to the due service of a notice to quit cannot be taken for the first time in second appeal.—Loknath Gop v. Pitambar Ghosh, 3 C. W. N., 215.

Clause (a): when the amount claimed does not exceed Rs 100:—In order to give rise to the bar to an appeal it must appear, upon the finding of the Judge or from the proceedings of the case, that the amount sued for does not exceed one hundred rupees.—Tulsi Panday v. Lala Bachulal I. L. R.. 9 Cal., 596; 12 C. L R., 223. In the absence of such material the High Court has no right to draw any inference to that effect.—*Ibid.* The term "amount" in section 153 means not merely the amount of rent claimed, but the whole amount claimed in the suit. Where therefore the amount of rent was below Rs. 100, but in addition to interest exceeded that sum, it was held that a second appeal was not barred.—Behari v. Bhutnath,

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3 C. W. N., 214. In a suit for arrears of *chowkidari tax* payable by a *putnidar* under the *putni* settlement, it was *held* that it came within the definition of rent inasmuch as the consideration for the payment of the *chowkidari tax* was the holding of the *putni* and the amount agreed to be paid was lawfully payable.—Assanulla v. Tirthabsbini, I. L. R., 22 Cal., 680. S. 586, C. P. C., will not bar a second appeal in such a suit although the value may be less than Rs. 500. Where a zemindar sued a putnidar *dak* expenses according to his *putni juma*, *held* that the suit was of a nature cognizable by a Court of Small Causes and therefore under s. 27, Act XXIII of 1861 no second appeal would lie:—Mahtab Chand v. Radha Benode, 8 W. R., 517. Where *Dak* cess is claimed under a contract by which rent is payable it must be regarded as rent.—Watson v. Sreekristo, I. L. R., 21 Cal., 132. 'No doubt the Act declares in ss. 53 to 68, both inclusive, and ss. 72 to 75 both inclusive, "rent" includes cesses, but we think that these are enabling provisions passed to extend the meaning of "rent" and it in no way interferes with the law refusing a right of appeal in suits below one hundred rupees in value, which law is made applicable to suits for cesses by s. 47 of Bengal Act IX of 1880 (B. C.)." *Per* O'KINEALY and BANERJEE, JJ.:—Rajani Kant v. Jogeshwar, I. L. R., 20 Cal., 254. A suit to recover cesses falls under s. 153 with respect to appeals.—Mohesh v. Umatara, I. L. R., 16 Cal., 638. Read with the provisions of sec. 193 of this Act, this section bars a second appeal, when the rent sued for is rent of a tank and the amount claimed is less than Rs. 100.—Mallu Pasari v. Wake, 2 C. W. N., li. No second appeal lies to the High Court from a decision of the District Judge staying execution in a suit for arrears of rent where the amount decreed is less than Rs. 100, merely because the decree directs that on failure to pay the amount the defendant will be ejected.—Parbutty v. Mondari I. L. R., 5 Cal., 594. No appeal lies from an order passed by a District Judge setting aside a sale in execution of an *ex partie* decree for amount valued at less than Rs. 100.—Monmohini v. Lukhinarin, I. L. R., 28 Cal 116.

Clause (b): When the amount claimed does not exceed fifty rupees.—Nearly all Munsiffs of five years' standing have now been invested with summary powers under this clause.—See Government Note No. 945 J. D. of June 15th 1894. in Cal., Gaz. of June 27th 1894, Pt. 1, p. 713.

Title to land as between parties having conflicting claims.—Under the old law where a case was decided solely on the want of a relationship of landlord and tenant between the parties, it was held that no special appeal lay to the Hight Court. It cannot be said that the tenant is a representative of a third party so as to make the decision in the suit one in respect of title to land as between parties having conflicting claims thereto.—Hurry Mohan Muzumdar v. Dwarkanath Sen, 18 W. R., 42; Shaik Dilbur v. Issur Chunder Roy, 21 W. R., 36; Kripa Moyi Debia v. Dropodi Chowdhrain, 24 W. R., 213. When a landlord sues a person as tenant, who repudiates the tenancy, not denying the landlord's title, no appeal is given under this section.—Ishan Chundra Ghosal v. Burnomoyee Dassi. 16 W. R., 233. In a suit for rent in which the defendant (raiyat) sets up the title of a third person

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who is not made a party, the decision cannot be considered to be a binding decision in respect of title as between parties having conflicting calims to the land within the meaning of this section.—Kashee Ram Dass v. Maharani Sham Mohini, 23 W. R., 227, Shaik Dibur v. Issur Chunder Roy, 21 W. R., 36. Where plaintiff claims rent as zemindar, and defendant, admitting his own tenancy, claims it as mortagee, there cannot be said to be conflicting claims to, or some interest in land within the meanig of this section.—Raj Kishen Mukerji v. Peary Mohan Mukerji, 24 W. R., 114. In a rent suit, where the judgment of the lower Appellate Court dismissing the plaintiff's appeal on the ground that plaintiff, as only a sharer, could not sue separately, shows that a question of title was not even considered, the decree in general terms could not be held to have determined it, and therefore under this section no special appeal lies.—Kureem Sheik v. Mokhoda Sundari Dassi, 23 W. R., 11, 268; 15 B L. R., 111. The circumstance that a question has been determined at the hearing of the appeal in a rent-suit, by which an intervenor may be injuriously affected, will not make the appeal cognizable as special appeal, unless the decision has involved some title or interest in land, of parties having conflicting claims thereto.—(Raj Kishen Mukerji v. Sree Nath Dutt, 23 W. R., 408. See also Lodai Molla v. Kali Das I. L. R., 8 Cal., 238; Durganarain v. Ramlal I. L. R, 7 Cal., 330. No second appeal lies in a case between landlord and tenant, in which the third person set up by the tenant is not made a party, there consequently being no question relating to title as between parties having conflicting claims.—Bama Persad Rai v. Sarup Paramanik, I. L. R., 8 Cal., 712. But in one case in which the value of the suit was under Rs. 100, it was held that an appeal was not barred, as the Lower Court had determined a question of law as to whether the tenure was *gusasta*.—Baijinath Saha v. Ramdaur Rai, 7 C. L. R.. 369. A question as to area does not raise any question of title between parties.—Horo parsed v. Sreedam 20 W. R., 15. In an action for rent the plaintiff alleged that she was the proprietress of a share of a zemindari, and also held other sharers as patnidar and darpatnidar, and had got her name registered in respect of those shares under Land Registration Act, 1876. The principal defendant denied the relationship of landlord and tenant, and also pleaded that in as much as the plaintiff was not registered under the Act, the suit was not maintaintable. The Court of first instance dismissed the suit on the ground that the plaintiff had failed to prove the relationship of landlord and tenant and also that as the plaintiff got her name registered, the suit was not maintainable. The Subordinate Judge on appeal decreed the suit on the ground that it was not necessary for the plaintiff to register her name, without deciding the question whether the relationship of landlord and tenant existed between the parties. On second appeal by the defendants it was held that the decree decided a question relating to title to land or some interest in land as between parties having conflicting claims thereto, and that therefore an appeal lay.—Sukurulla Kazi v. Bama Sundari, I. L. R., 24 Cal., 404. Similarly where the plaintiff claimed rent on the ground that the defendant was his sub-tenant, while the defendant pleaded that he held directly under the zemindar and was the tenant of the land under him, and the plaintiff's suit was dismissed,

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it was held that a second appeal would lie.—Sitanath v. Kartik Gharumi, 8 C. W. N., 434. But where the question was one between a tenure-holder and a raiyat, and the latter set up the title of a superior tenure-holder, who was not a party to the suit, it was held that no second appeal would lie.—Ram Mohan v. Budan Barai, 8 C. W. N., 436. Where the defendant claimed to hold under the plaintiff and his mother, under a right different from that which was set up by the plaintiff, it was held that no second appeal would lie.—Dino Bandhu v Nobin Chunder, 8 C. W. N., 437. Where plaintiff and defendant both claimed under the same landlord, the plaintiff claiming as a jotedar and the defendant as a burgadar, the settlement with the defendant having been prior to that with the plaintiff, the Lower Appellate Court held that the plaintiff's position as tenant was not superior to that of the defendant, and that the relationship of landlord and tenant did not exist between the two, since there was no proof of an assignment of the right of the plaintiff's lessor to collect rent from the defendant. On appeal to the High Court it was held that the decision of the Subordinate Judge as regards the status of the plaintiff in relation to the defendant was foreign to the object of the suit and quite irrelevant, and that the plaintiff's position was that of an intermediate holder with a right to receive rent from the defendant; and that, since there was a question of title between parties having conflicting claims, a second appeal would lie. On further appeal under section 15 of the Letters Patent, however, it was decided by the High Court that, since the Subordinate Judge had found that the relationship of landlord and tenant did not exist, and since the High Court was bound by that finding, the decision of the Subordinate Judge must be upheld.—Ram Kanai v. Fakir Chand, 8 C. W. N., 438. An order setting aside a sale in execution of a decree decides a question relating to the title to the land or to some interest in the land as between parties having conflicting claims thereto and is therefore appealable under this section although it was made by an officer specially authorised under the section, in a suit for rent valued at less than 50. In deciding whether an order is appealable under that section, the point for consideration is not what the decree in the suit decided, but what the order decided. Monmohini Dassee v. Lakhinarain Chandra I. L. R., 28 Cal., 116, distinguished—Ganga Charan Bhuttacharjee v. Shoshi Bhusan Roy, I. L. R., 32 Cal., 572. Held by the full Bench (Rampini J. dissenting) that an order setting aside or refusing to set aside a sale held in execution of a decree for rent wherein the decree-holder was the purchaser, decides a question relating to the title to the land or to some interest in the land as between parties having conflicting claims thereto. An appeal therefore lies from such an order even when there could be no appeal from the decree in the suit on account of the prohibition contained in this section.—Kali Mondal v. Ram Sarveswar Chakraburti: 9 C. W. N., 721 (F. B.)

Right to enhance or vary the rent:—Not only therefore in enhancement suits, but also in suits for commutation of rent or assessment of rent, a special appeal will lie. Because both of these modes will come under the provisions of variation of rent. Second appeal in a suit for rent below Rs. 100, in which the right to enhance had been determined.—Watson & Co. v. Ramdhan Ghosh, 17 W. R., 496; but not

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where no such right had been decided.—Golak Chandra Datta *v.* Miah Rajah Mizi, 17 W. R., 119. No appeal will lie merely because the rate of rent has been varied by the decision of the Court, unless the Judge has determined the right to vary the rent.—Watson *v.* Mohendro Nath Pal, 23 W. R., 436. A rent suit in which the only question is whether the rent is to be paid in instalments cannot be said to involve a question of a right to enhance or vary the rent.—Piari Mohan Mukherji *v.* Madhub Chandra, 23 W. R., 385. See also Rai Churun *v.* Kumud Mohan, 2 C. W. N., 297; I. L. R., 25 Cal., 571; Kailash *v.* Tarak, 1 C. W. N., lxvi; I. L. R., 25 Cal., 571, note; and in a suit on the basis of an ikrarnama when the raiyat denied that he had executed that document and produced evidence to show that the rates mentioned in it were not correct, no question of right to vary the rent was held to be involved and no second appeal lay.—Nitressar Singh *v.* Jhoti Teli, 23 W. R., 343.

Appeal when amount of rent annually payable is decided.—This provision is an innovation. Section 102 of Act VIII of 1869 B. C. gave no right of appeal in cases in which merely a question as to the amount of rent payable was involved.—(Haro Prasad Chakravartti *v.* Sridam Chandra Chaudhri, 20 W. R., 16; Narabdessar 20 W. R., 15; Harish Chandra Chakravartti *v.* Hari Bewah, Prasad Rai *v.* Jangli, 24 W. R., 49). A second appeal is barred even if preferred after the B. T. Act came into operation.—Hurro Sundari Dabi *v.* Bhojohari Das Manji, L. R., 13 Cal., 86; Satghuri *v.* Mujidan, I. L.R., 15 Cal., 107. If a question relating to the amount of rent annually payable is decided by the decree under the present Act, an appeal would not be excluded even though that question does not directly form the subject of the appeal.—Sripati Bhattacharja *v.* Kala Chand Ghose 1 C. W. N., clxxxvii; Rai Churn Ghosh *v.* Kumud Mohon Dutta, 1. C. W. N., 687. Where the plaintiff claimed to be entitled to the full amount of rent payable by a tenant, and the Lower Court was of opinion that he was entitled to a less amount, inasmuch as a part of the tenure had been sold in execution of a decree for road-cess and had passed into the hands of a third party, it was held that a second appeal lay.—Nobin Chand Nuskar *v* Baneenath Paramanick, I. L. R., 21 Cal., 722. A question in a rent suit whether rent is payable in money or kind is a question as to the amount of rent annualy payable within the meaning of this section.—Apurba Krishna Roy *v.* Ashutosh Dutta, 9 C. W. N. 122. In a suit in which the plaintiff sued for arrears of rent as well as of cesses and dâk tax, the total amount claimed being less than one hundred rupees, and the defendant pleaded that he was not liable to dâk cess, and it was held by the Subordinate Judge that the defendant was not liable to pay dâk cess, it was ruled that a second appeal lay, as a question of the amount of rent annually payable by the tenant had been decided.—Watson *v.* Srikrishna Bhumik, I. L. R., 21 Cal., 132. In Mohesh Chandra Chattapadhya *v.* Umatara Debi, I, L. R,, 16 Cal., 638, and Rajani Kant Nag *v.* Jageshwar Snigh, I. L. R., 20 Cal., 254, it has been held that no second appeal lies in suits for cesses, in which the amounts claimed are less than one hundred rupees. The words "amount of rent annually payable by a tenant" include the case

Rent in money or kind.

Cesses.

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Rent to co-sharers.

of rent payable by a tenant to one of the co-sharer landlords who collects his rent separately.—Aubhoy Churn Maji *v.* Shoshi Bhusan Bose, I. L. R., 16 Cal., 155; Narain Mahton *v.* Manofi Pattuk, I. L. R., 17 Cal., 489 (F. B.). 5 C. W, N 766; overruling Prasanna Kumar Banerjee *v.* Srinath Dass, I. L. R., 15 Cal., 231. Where, in a suit instituted by a co-sharer landlord for the recovery of rent, the amount claimed did not exceed Rs. 100 but the question raised and determined was not merely the amount of rent payable to the co-sharer, but also whether he had a title to recover a particular share of the rents of a particular mouza, it was *held* that the suit came under the exception mentioned in section .—Srimuty Poresh Moni Dassya *v.* Nobo Kishore Lahiri, 8 C. W. N., 193. A decree obtained by a co-sharer landlord for his share of rent is not a decree for rent under the Bengal Tenancy Act and it has been held that s. 170 of the Act therefore does not apply.—Beni Madhub *v.* Joad Ali, 17 Cal., 390, see also Parameshar v. Kali Mohon. 4 C. W. N., 801; 28 Cal, 127. But it has been held notwithstanding that s. 153 of the Act applies to a decree obtained by a co-sharer landlord.—Kedar Nath *v.* Ardha Chandra, 5 C. W. N., 763 at p. 766, see also appeal from Appellate Order No. 325 of 1902, Jogendra Nath Ray *v.* Uma Charan Ray (unreported). The provisions of this section do not to apply to the case of a suit for rent by a co-sharer landlord.—Jogendra Nath Ghose *v.* Paban Chandra Ghose, 8 C. W. N., 472. In order to exclude a right of appeal under section 153, the suit must be in reality an action for rent; a suit for compensation or damages in the guise of a claim for rent does not come within the purview of section 153.—Chandi Charan Tarafdar *v.* Jogendra Chandra Chowdhry, 1 C. W. N., cxx. Where the only issue decided is to whom the rent claimed is payable, *i, e,* to the plaintiff or the person set up by the defendant as his landlord, and there is no dispute as to the amount of rent, it has been held that there is no right of second appeal.—Baidya Nath Bahara *v.* Dhone Krishna Sirkar 5 C. W. N., 515. Similarly, where, upon the failure of the plaintiff to prove the rate of rent claimed by him, a decree is made at the rate admitted by the defendant, it is not a determination of the amount of rent payable, and therefore no second appeal would lie.—Nekejaie *v.* Nonda Dulal Bamkeja, 1 C. W. N., 711. When the only question decided relates to the amount of interest payable, and the value of the subject-matter of the suit does not exceed Rs. 100, there is no right of second appeal.—Koylash Chandra De *v.* Tarak Nath Mandal I. L. R., 25 Cal., 571. Nor is there a right of appeal when the question relates to the instalments in which the rent is payable.—Rai Chanan Ghose *v.* Kumud Mohun Dutt Chowdhry I. L. R., 25 Cal., 571; 2 C. W. N., 297. The question relating to instalments, though it affected the question of interest on the rent, was not a question of the "amount of rent annually payable" within the meaning of section 153.—*Ibid.* In another case, where the Subordinate Judge had decided that the *kabuliyats*, on the basis of which certain suits for rent were brought, were genuine, and that the plaintiffs were entitled to receive rent from the defendants at the rates mentioned therein, the High Court held that the deci-

Instalment of rent.

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sion was not a decision of a question of the amount of rent annually payable by the tenants, and consequently that an appeal was barred.—Basiruddi *v.* Nolini Bhusan Gupta, 6 C. W. N., lxxxviii.

Proviso:—See notes *ante* under the headings of District and Additional Judges and High Court's powers of revision, and pp. 475—76. The powers of revision in the *proviso* are the same as those contained in s. 622, C. P. C., which is as follows:—The High Court may call for the record of any case in which no appeal lies to the High Court, if the Court by which the case was decided appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity; and may pass such order in the case as High Court thinks fit. It has been decided by their Lordships of the Judicial Committee that when a Court has jurisdiction to decide a case and decides it rightly or wrongly, it does not exercise its jurisdiction *illegally or with material irregularity* within the meaning of s. 622, C. P. C.—Amir Hassan *v.* Sheo Baksh Singh, 11 I. L. R., Cal., 6 (P. C.). In Amir Hossain's case it was decided that even if a Court having jurisdiction to decide a case, wrongly decided a question of *resjudicata*, it did not exercise its jurisdiction illegally or with material illegality within the meaning of s. 622, C. P. C. A mere mistake in law by a Lower Court does not bring a case under s. 622, C. P. C., (*Per* Maclean, C. J.): Raghunath v. Ra-Chatraput, 1 C. W. N., 633. See Mohunt Bhagwan v. Khetter Moni, 1 C. W. N., 717; Birj Mohun v. Rai Umanath, I. L. R., 20 Cal., 8; Jagadanand *v.* Amrita Lal, I. L. R., 22 Cal., 767; Magniran v. Jiwa Lal, I. L. R., 7 All., 336, Badami Kuar v. Dinu Rai, 8 All., 111; Sheo Bu v. Shib Chunder, 13 Cal., 225, Jagabandhu v. Jadu Nath, I. L. R., 15 Cal., 47; Kristamma v. Chapa Nandu, I. L. R., 17 Mad., 410; Mahomed Yusaf v. Abdul Raman, I. L. R., 16 Cal., 749; Mathuranath v. Umes Chunder, 1 C. W. N., 626; Raghunath v. Rai Chaterput, 1 C. W. N., 633; Rahim Bux v. Nanda Lal, I. L. R., 14 Cal., 321; Debo Das v. Mohunt Ram Churn, 2 C. W. N., 474. In Mohunt Bhagwan v. Khetter Moni, 1 C. W. N., 617, Banerjee and Gordon, JJ., held that the third clause s. 622, C. P. C., is intended to authorise the High Court to interfere and correct gross and palpable errors of Subordinate Courts, so as to prevent grave injustice in non-appealable cases, and the question whether any case comes under the clause has to be determined with reference to the grossness and palpableness of the error complained of, and to the gravity of the injustice resulting from it. The case in 1 C. W. N. 617 was considered by Maclean, C. J., in the case of Enat Mondal v. Baloram Dey, 3 C. W. N. 581. His Lordship observed as follows:—"The learned Judges in the latter case (Mohunt Bhagwan v. Khertter Moni, 1 C. W. N. 617) however apparently engrafted upon the Privy Council decision a limitation, to the effect that the Court can interfere under s. 622, if the error of law be "gross and palpable." This, to my way of thinking and with all respect, is frittering away.

Exercise of jurisdiction illegally or with material irregularity.

Mistake in law.

Third clause of s. 622 C. P. C.

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Second appeal under Bengal Act I of 1879:—In suits instituted under Bengal Act I of 1879 (the Chota Nagpur Landlord and Tenant Procedure Act) for arrears of rent and ejectment on account of the non-payment of arrears, a second appeal lies to the High Court; this class of cases not being within the provision of section 137 of that Act.—Ramjan Khan v. Ramjan Chamar, I. L. R., 10 Cal., 89.

Date from which decree for enhancement takes effect.

154. A decree for enhancement of rent under this Act, if passed in a suit instituted in the first eight months of an agricultural year, shall ordinarily take effect on the commencement of the agricultural year next following; and, if passed in a suit instituted in the last four months of the agricultural year, shall ordinarily take effect on the commencement of the agricultural year next but one following; but nothing in this section shall prevent the Court from fixing, for special reasons, a later date from which any such decree shall take effect.

For definition of the term "agricultural year," see section 3, clause 11, *ante*.

Relief against forfeitures.

155. (*1*) A suit for the ejectment of a tenant, on the ground—

(*a*) that he has used the land in a manner which renders it unfit for the purposes of the tenancy, or

(*b*) that he has broken a condition on breach of which he is, under the terms of a contract between him and the landlord, liable to ejectment,

shall not be entertained unless the landlord has served, in the prescribed manner, a notice on the tenant specifying the particular misuse or breach complained of, and, where the misuse or breach is capable of remedy, requiring the tenant to remedy the same, and, in any case, to pay reasonable compensation for the misuse or breach, and the tenant has failed to comply within a reasonable time with that request.

(*2*) A decree passed in favour of a landlord in any such suit shall declare the amount of compensation which would reasonably be payable to the plaintiff for the misuse or breach, and whether, in the opinion of the Court, the misuse or breach is capable of remedy; and shall fix a period during which it shall be open to the defendant to pay the amount to the plaintiff, and, where the misuse or breach is declared to be capable of remedy, to remedy the same.

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(3) The Court may, from time to time, for special reasons, extend a period fixed by it under sub-section (2).

(4) If the defendant, within the period or extended period (as the case may be) fixed by the Court under this section, pays the compensation mentioned in the decree, and where the misuse or breach is declared by the Court to be capable of remedy, remedies the misuse or breach to the satisfaction of the Court, the decree shall not be executed.

See sections, 10, 25, 44, 66, 82 and 83 and notes *ante*.

The difference between section 155 of the present Act and section 14 of the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict., c. 41), was considered by the High Court in Pershad Sigh *v.* Ram Partab I. L. R., 22 Cal., 77, and it was shown that the Indian and English Statutes are not *in pari materia*, and excepting a verbal similarity between a portion of section 155 of the Indian Act and a portion of section 14 of the English Statute, they do not run on parallel lines. The English cases decided under 44 & 45 Vict., c. 41, therefore, do not apply to cases arising under section 155 of the present Act. For exposition of s. 155, see the above judgment at pp. 84 and 85. When the suit is really for ejectment, and the plaintiff gives notice for ejectment and asks for ejectment, then, if there are other prayers in the plaint, they must be regarded as merely ancillary to the prayer for ejectment. And, in order to maintain the action, there must be a demand for compensation.—*Ibid.*

Notice to pay compensation:—The words "in any case" in this section mean "in every case," and the omission of a demand for compensation in a notice under the section renders the notice bad, and prevents a suit for ejectment under this section from being entertained. When the suit was for ejectment from certain land but the plaint contained other prayers, namely, for a declaration that the defendant had no right to build houses on the land, and for an injunction on him to remove houses he had built thereon, and the suit for ejectment failed from insufficiency of notice under the sec. 155, it was held that the plaintiff was not entitled to the declaration or injunction as asked for.—Prasad Singh *v.* Ram Pratab Rai, I. L. R., 22 Cal,, 77. Where a landlord served a notice on a tenant, calling upon him to fill up an excavation which the latter had made, or to pay damages, or, failing either, to quit the land, it was *held* by the High Court that the notice was good, notwithstanding that the demand for compensation was made in the alternative.—Boydya Nath v. Ghisa Mundal, I. L. R., 30 Cal., 1063.

Service of notice:—For the rules framed by the Local Government for the service of the notice referred to in the sub-section 1 of this section, see rule 11Chap. V, of the Government rules under the Act (Appendix).

Waiver of forfeiture:—A landlord who has accepted rent from his tenant subsequently to the date of forfeiture must be held to have waived his right to eject-

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ment.—Kali Krishna Tagore v. Fazal Ali Chaudhri, I. L. R., 9 Cal., 843. If he sues his tenant for rent due subsequently to the date of the forfeiture, he will similarly lose his right to eject.—Jageshari Choudhrain v. Mahomed Ibrahim, I. L. R., 14 Cal., 33. But he can sue for ejectment on further breaches of the conditions of the lease.—Duli Chand v. MeherChand Sahu, 8 W. R., 138. Receipt of rent is not in itself a waiver of every previous forfeiture; it is only evidence of a waiver.—Chandra Nath Misra v. Sardar Khan, 18 W. R., 218.

Co-sharer landlords right to eject;—In a suit for ejectment by one of two joint owners of certain *jota* land, which the tenant held under a *pattah*, which provided that he could not without the consent of the plaintiff cut the trees in the garden, excavate tanks and turn *dhose* land into *jul*, and in which it was found that he had done all these things, it was held that the plaintiff was not barred from suing by the provisions of sec. 188 of this Act. "The right under which the plaintiff sues, is not a thing which she, as landlord, is under the Bengal Tenancy Act required or authorised to do. The suit is brought under the contract on breach of the conditions of a lease by the tenant—" Haripria Debi v. Ram Charan Mahanti, I. L. R., 19 Cal., 541. If one co-sharer refuses to join in a suit for the ejectment of the tenant for an alleged breach of a covenant, he is either satisfied that there has been no breach or that the act of the tenant is not injurious to him. Having regard to the language of the Judicial Committee in the case of Watson v. Ram Chand Dutta, I. L. R., 18 Cal., 10 L. R., 17 J.A., 110, it would seem that the remedy, in such a case, of the co-sharer who complains of a breach is to seek a partition of the property with his other co-owner. In the case referred to their Lordships said as follows :—It seems to their Lordships that if there be two or more tenants in-common, and one *A* be in actual occupation of part of the estate, and is engaged in cultivating that part in a proper course of cultivation as if it was his separate property, and another tenant-in-common *B* attempts to come upon the said part for the purpose of carrying on operations there inconsistent with the course of cultivation in which *A* is engaged and the profitable use by him of the said part, and *A* resists and prevents such entry, not in denial of *B's* title, but simply with the object of protecting himself in the profitable enjoyment of the land, such conduct on the part of A would not entitle *B* to a decree for joint possession. . . . . In India a large proportion of the lands, including many very large estates, is held in undivided shares, and, if one shareholder can restrain another from cultivating a portion of the estate in a proper and husbandlike manner, the whole estate may, by means of cross-injunctions, have to remain altogether without cultivation until all the shareholders can agree upon a mode of cultivation to be adopted, or until a partition by metes and bounds can be effected, a work which, in ordinary course, in large estates would probably occupy a period including many seasons. In such a case, in a climate like that of India, land which had been brought into cultivation would probably become waste or jungle, and greatly deteriorated in value. In Bengal the Courts of justice, in case where specific rule exists, are to act according to justice, equity and good conscience, and if, in a case of share

Remedy where co-sharer refuses to join.

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holders holding lands in common, it would be found that one shareholder is in the act of cultivating a portion of the lands which is not being actually used by another, it would scarcely be consistent with the rule sbove indicated to restrain him from proceeding with his work, or to allow any other shareholder to appropriate to himself the fruits of the other's labour or capital. In Lachmessur v. Monowar I. L. R., 19 Cal., 252, P. C, the Judicial Committee declared that property does not cease to be joint merely because it is used so as to produce more profit to one of the joint owners, who has incurred expenditure or risk for that purpose. It follows that, joint property being used, consistently with the continuance of the joint ownership and possession, without exclusion of the co-sharers who do not join in the work, there is no encroachment on the rights of any of them, as regards common enjoyment, so as to give ground for a suit. The principle deducible from the above decisions has been stated as follows :—"When one co-sharer is holding possession of certain land, and deals with it in a particular way, and in the ordinary course, if the other co-sharers are not satisfied with that dealing or with that course of conduct, their proper remedy is by partition. In a partition suit the rights of all the parties are adjudged upon a proper basis, and any loss or damage suffered by one set of partners is made good at the expense of the other,—Madan Mahan *v.* Rajab Ali, I. L. R., 28 Cal., 223. In this case a silted-up tank had been leased by one set of co-sharers to certain lessees who had re-excavated and improved it at considerable expense. Upon a suit by the other co-sharers to obtain *khas* possession of the tank in respect of their share it was held that they were not entitled to *khas* possession, but were entitled only to possession through the joint tenants by receipt of their share of the rent.

Limitation.—The period of a suit for ejectment of a tenant on the ground mentioned in clause (*a*) of this section is two years under art. 32, Sched. II of Act XV of 1877.—Soman Gope v. Raghubar Ojha, I. L. R., 24 Cal., 160 ; 1 C. W. N., 223. Where a person having a right to use the property demised to him for one purpose, *viz.*, for agricaltural purposes perverts to another purpose, *viz.*, that of a tank, and a suit is brought seeking as primary relief a mandatory injunction directing the defendant to fill up the tank, and to pay the plaintiff compensation and a secondary relief for ejectment which could not follow save upon failure of the defendant to comply with that order, the case comes within the provisions of art. 32 of Sch. II of the Limitation Act ;—Saroop Das v. Jogeswar, 3 C. W. N., (F. B.).

Rights of ejected raiyats in respect of crops and land prepared for sowing.

156. The following rules shall apply in case of every raiyat ejected from a holding :—

(*a*) when the raiyat has, before the date of his ejectment, sown or planted crops in any land comprised in the holding, he shall be entitled, at the option of the landlord, either to retain possession of that land and to use it for the purpose of tending and gathering in the crops, or to receive from the landlord the value of the crops

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as estimated by the Court executing the decree for ejectment;

(*b*) when the raiyat has, before the date of his ejectment, prepared for sowing any land comprised in his holding, but has not sown or planted crops in that land, he shall be entitled to receive from the landlord the value of the labour and capital expended by him in so preparing the land, as estimated by the Court executing the decree for ejectment, together with reasonable interest on that value;

(*c*) but a raiyat shall not be entitled to retain possession of any land or receive any sum in respect thereof under this section where, after the commencement of proceedings by the landlord for his ejectment, he has cultivated or prepared the land contrary to local usage;

(*d*) if the landlord elects under this section to allow a raiyat to retain possession of the land, the raiyat shall pay to the landlord, for the use and occupation of the land during the period for which he is allowed to retain possession of the same, such rent as the Court executing the decree for ejectment may deem reasonable.

This provision supersedes some of the recent decisions. So it was held at a sale for arrears of rent under section 66 of Bengal Act VIII of 1869, the growing crop standing on the land passes to the purchaser at the auction-sale, except when it has been specially excepted by the notification of sale, or a custom to the contrary has been proved.—Afatoollah Sirdar v. Dwarkanath Moitry, I. L. R., 4 Cal., 814. This provision is, however, consistent with the spirit of decisions in Jubraj Roy v. W. Mackenzie, 5 C. L. R., 231. and Juggut Chunder Roy *alias* Bashi Chunder Roy v. Rup Chand Chango, I. L. R., 9 Cal., 48. The effect of an order of ejectment under section 53 of Act VIII of 1869 (B. C.), is to dispossess the raiyats, not only from the land, but also of the crop standing thereon, the object of such an ejectment being to terminate completely the connection between the parties as landlord and tennat—(*In the matter of* Durjan Mahton v. Wajid Hossein, I. L. R., 5 Cal., 135). "The obvious difference between sale and ejectment is this; when a raiyati holding is sold up he gets the money which includes the value of the crop on the ground. Why, when he was ejected, should he lose it? In regard to this point the Rent Commission said:—There are in the existing law no provisions as to the *away-going crop*; and, as a natural consequence, when a tenant is ejected while the crop is on the

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ground, the right to this crop is a constant source of dispute and litigation. We have enacted that when a raiyat is ejected in execution of a decree—and this we have just shown is the only way in which he can be ejected—and there are upon the land at the time of the ejectment growing crops or other ungathered products of the earth, which but for the ejectment such raiyat would have been entitled to reap or gather, such raiyat shall, notwithstandig such ejectment, be entitled to reap or gather such crops or products, and may use the land for the purpose of tending, reaping gathering and removing the same; and in the event of his doing so, he shall be liable to pay a reasonable sum for the use and occupation of the land for these purposes (section 80). We have, however, thought it reasonable to allow the landlord an option of taking such crops or products at a reasonable valuation, if he gives notice of his intention to do so at the time when he applies for execution. If the landlord and tenant cannot agree as to the value of the crops or products, the Court may, upon the application of either of them, determine such value, and the order so determinig such value shall have the force of a decree. The principle seems to be a very sound one that the landlord should not by choosing his time for ejectment not only ruin his raiyat but should himself benefit by the crop in the ground which the raiyat has sown and which he is entitled to reap."—(The Hon'ble Sir Stuart Bayley in Council.)

Power for Court to fix fair rent as alternative to ejectment.

157. When a plaintiff institutes a suit for the ejectment of a trespasser he may, if he thinks fit, claim as alternative relief that the defendant be declared liable to pay for the land in his possession a fair and equitable rent to be determined by the Court, and the Court may grant such relief accordingly.

Alternative relief:—This alternative relief is confined to agricultural lands; occupation in respect of such lands giving rise to an implied tenancy.—Rachea Singh *v.* Upendra Chandra I. L. R., 27 Cal., 239. The section, therefore, does not apply to ferry tolls and other property of the like nature. In a suit for rent, pure and simple, of other than agricultural lands, when no alternative claim is made for compensation for use and occupation, no decree can be made on the latter basis.—Surendra *v.* Bhai Lal Thakur, I. L. R., 22 Cal., 732; Racha Singh v. Upendra, *Supra*. The provisions of this section may be applicable, and a right to claim rent may, on a plaintiff's title being established, arise notwithstanding that his previous suit for rent was dismissed.—(Dwarkanath Rai v. Ram Chand Aich, 3 C. W. N., 266; I. L. R., 26 Cal., 428.)

Trespassers:—Tenants inducted upon the land by any person in *defacto* possession, although without title, are not trespassers.—Ramgut Panday *v.* Radha Pershad Singh, 22 W. R., 195; Mohima Chunder Shaha *v.* Hazari Pramanik I. L. R., 17 Cal., 45; Binad Lal Pakrashi v. Kalu Pramanik I. L. R., 20 Cal., 708 (F. B.); Azim Sirdar *v.* Ram Lall Shaha, I. L. R., 25 Cal., 324. Compare also Lukhee Kant Doss Chowdhry *v.* Sumeeroodd, Tustar 13 B. L. R., 243; 21 W. R., 208; Ranee Lalun Monee *v.* Sona Monee Dabee, 22 W. R., 334; Rani Surnomoyee *v.* Deno

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Nath Gir Sunnyasee, I. L. R., 9 Cal., 908, where it was held that persons in use and occupation of land may be treated as tenants and sued for rent. Tenancy in this country is created not only by contract, but also by occupation of land, so for as agricultural lands are concerned.—Nityanand Ghose *v.* Kisen Ksishore, W. R., Sp., Act 82. See p. 429 *ante*.—Under the old law, the receiving of rent from a trespasser or the suing him for rent, converted him into a tenant.—Cazee Syud Mahomed Azmul *v.* Chundee Lall Pandey, 7 W. R., 250; Gudadhur Banerjee v. Khettur Mohun Surmah, 7 W. R., 460. This principle, being founded on a well-recognised rule of equity, is applicable under the present enactment. But a mere statement of willingness on the part of the person occupying the land would not convert a trespasser into a tenant.—Lyons v. Betts, 13 W. R., 94. Where one of the co-sharers of a joint *taluk*, in execution of a money-decree obtained against one of the common tenants of the *taluk*, purchases a non-transferable occupancy-holding, and under such purchase claims to hold possession of the lands thereof to the exclusion of the other co-sharers, the case does not fall within the principle laid down in Watson & Co. *v.* Ramchund Dutt, I. L. R., 18 Cal., and the other co-sharers are entitled to maintain a suit for joint possession of the said lands,—Dilbar Sardar v. Hossein Ali, I. L. R., 26 Cal. 553., Kamal Kumari *v.* Kiran Chandra, 2 C. W. N., 229.

Rights of other co-sharers where one of them purchases a holding.

Whether co-sharers can eject a common tenant:—Although one co-sharer may sue for his share of the rent a person in occupation of the land, treating him as tenant, it is doubtful whether a suit for ejectment can lie at his instance alone without the conjunction of the other co-sharers.—Azim *v.* Ramlal, I. L. R., 25 Cal., 324. When a tenant has been put into possession of *ijmali* property with the consent of all the co-sharers, no one or more of the co-sharers can turn the tenant out without the consent of the others; but no person has a right to intrude upon *ijmali* property against the will of the co-sharers or any of them: if he does so, he may be ejected without notice either altogether, if all the co-sharers join in suit, or partially, if some only wish to eject him; and the legal means by which such a partial ejectment is effected is by giving the plaintiffs possession of their shares jointly with the intruder—Radha Prasad Wasti *v.* Isaf, I. L. R., 7 Cal., 414; Haladhar Sen *v.* Gurudas Rai, 20 W. R., 126; Hamidunnissa v. Ismail, 1 C. W. N., cxciii. A decree for partial ejectment and joint possession can be made in favour of a co-owner of property.—Kamal Kumari Chaudhurani *v.* Kiran Chandra Rai, 2 C. W. N., 229. This is the rule as regards trespassers or persons who are trespassers in relation to the co-sharer landlords who seek to eject them, and in such a case it is not necessary to bring a suit for partition against the other co-sharers.—Dilbar Sardar *v.* Hossein Ali, I. L. R., 26 Cal., 553. A different rule has apparently been laid lown by the Privy Council in the case of tenants in common who take exclusive possession of any portion of the common property and who in law are not trespassers. See Watson & Co. *v.* Ram Chand Datta, I. L. R,. 18 Cal., 10 and Lachmessar Singh *v.* Manowar Hossein I. L. R., 19 Cal., 253; Madan Mohan Shaha *v.* Rajab Ali, I. L. R., 28 Cal., 223, cited under the same heading under s. 155 *ante*.

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Application to determine incidents of tenancy.

158. (1) The Court having jurisdiction to determine a suit for the possession of land may, on the application of either the landlord or the tenant of the land, determine all or any of the following matters, (namely) :—

(*a*) the situation, quantity and boundaries of the land ;

(*b*) the name and description of the tenant thereof (if any) ;

(*c*) the class to which he belongs, that is to say, whether he is a tenure-holder, raiyat holding at fixed rates, occupancy-raiyat, non-occupancy raiyat, or under-raiyat, and, if he is a tenure-holder, whether he is a permanent tenure-holder or not, and whether his rent is liable to enhancement during the continuance of his tenure ; and

(*d*) the rent payable by him at the time of the application.

(2) If, in the opinion of the Court, any of these matters cannot be satisfactorily determined without a local inquiry, the Court may direct that a local inquiry be held under Chapter XXV of the Code of Civil Procedure by such Revenue-officer as the Local Government may authorize in that behalf by rule made under section 392 of the said Code. XIV of 1882.

(3) The order on any application under this section shall have the effect of, and be subject to the like appeal as, a decree.

Object of the section :—In a proceeding under s. 158 it is open to a petitioner to dispute the validity of the *patta* set up by the tenant ; in determining the question as to the nature of the tenancy the Court must look into the title which the tenant set up and pronounce upon its validity.—Bhupendra Narayan *v.* Nemye Chand, I. L. R., 15 Cal., 627. The object of this section is to enable the Court to ascertain what are the incidents of the existing arrangements between a landlord and his tenant and not to enable the Court to make a new contract between the parties between whom no contract was in exictence at and before the date of application.—Debendra Kumar *v.* Bhupendra Kumar, I. L. R., 19 Cal., 182. The object of section 158 is merely to provide a summary procedure for settling disputes between landlord and tenant in regard to the particulars referred to in clauses (*a*), (*c*) and (*d*) of the section. Though clause (*b*) does authorise the Court to determine the name and description of the tenant, this, we think,

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was not intended to, and does not authorize the Court to decide conclusively disputes as to who is the tenant or as to who is entitled to the occupation of the land. The section, in other words, does not empower the Court to decide disputes as to the right to possession of the land. It could not, in a proceeding nnder section 158 of the Act, pass a decree for possession ; so that, if it were to decide such question, it might declare one person entitled to possession, while another might ostensibly hold, and might continue to hold, actual and direct possession of the land.—Peary Mohun *v.* Ali Sheik, I. L. R., 20 Cal., 249. Section 158 (*d*) lays down that a Court dealing with an application under section 158 is to determine the rent payable by the tenant "at the time of the application." It, therefore, could not have been intended that in a case under this section the Court should pass a decree for enhancement, which can ordinarily only take effect from the beginnig of the agricultural year next following, or from that of the year next but one following the year in which the decree was passed. It has been said that, when no settlement proceedings are going on, an application under section 158 takes the place of an application under section 104 (2), in the course of which a Settlement-officer has power to enhance or reduce a tenant's rent. This is quite true; but, when settlement proceedings are going on, the jurisdiction of the Civil Court is in abeyance (see section 111A), so that no enhancement suit can then be instituted, and hence it is that the Settlement-officer is empowered to alter a tenant's rent. But an application under section 158 does not oust the jurisdiction of the Civil Court in respect of the alteration of a tenant's rent. It therefore seems to us that if a landlord seeks to enhance his tenant's rent, when no settlement proceedings are going on, he must institute a suit for the purpose, and cannot do so by means of an application under s. 158"—(Rajeswar Prasad Singh *v.* Barta Koer, I. L. R. 21 Cal., 807.) In a proceeding under sec. 158, in which an enquiry had to be made as to the boundaries of the tenant's holdings, the amin took evidence as to the standard measure of the district, and it was held that that this evidence had been rightly admitted and acted upon—Deoki Singh *v.* Seo Gobind Sahu, I. L. R., 17 Cal., 277. The question whether a holding is transferable cannot be gone into under sec. 158.—Purna Rai *v.* Bangshidhar Singh, 3 C. W. N., 15. In a proceeding under s. 158, the Court has no jurisdiction to assess additional rent for excess lands found to be in the occupation of the tenant, its function being limited to recording the existing rent payable by the tenant at the time of the application.—Srinarain Thakur *v.* Rameswar Singh, 5 C. W. N., cciii. Under clause (*d*) a Court has to determine what the existing rent is and it has no jurisdiction to determine what the rent should be, and consequently additional rent for additional area cannot be assessed in such a proceeding,—Srinarain v. Luchmeshwar, 6 C. W. N., 592. It has been decided in the case of Dharani Kant *v*, Saber Ali, 7 C. W. N., 33: 30 Cal. 339, that where there is a total denial of relation of landlord and tenant by one of the parties, a Revenue officer has jurisdiction in a proceeding under s. 103 of the Bengal Tenancy Act to decide that question, but his decision, although it may have the force of a decree, does not operate as *res-judicata* in a

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subsequent suit by the landlord for ejectment. An application under section 158 of the Bengal Tenacy Act, 1885, cannot be made by one of several joint-londlords. Section 188 of the Act requires that such an application should be made by all the landlords acting together, and it is not a sufficient compliance with its provisions to make the landlords, who refuse to join, parties to the proceedings under sec. 158.—Moheeb Ali *v.* Ameer Rai, I. L. R., 17 Cal., 538. Section 158 does not authorize one joint application for the purpose of determining the incidents of several tenancies, or one joint application against a number of tenants having separate and distinct holdings or tenures. The application contemplated by the section is in the nature of a suit against each tenant separately.—Golap Chand Nowlakha *v.* Ashutosh Chatterjee, I. L R., 21 Cal., 602. But the landlord or joint-landlords may proceed in one application in respect of several tenancies held by the same tenant or set of tenants.—Dijendra Nath Roy Chowdhry *v.* Soylendra Nath Roy Chowdhry, I. L. R., 24 Cal., 197; 1 Cal., W. N., 236.

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CHAPTER XIV.

SALE FOR ARREARS UNDER DECREE.

General power of purchaser as to avoidance of incumbrances.

159. Where a tenure or holding is sold in execution of a decree for arrears due in respect thereof, the purchaser shall take subject to the interests defined in this chapter as "protected interests," but with power to annul the interests defined in this chapter as "incumbrances:"

Provided as follows:—

(*a*) a registered and notified incumbrance within the meaning of this chapter shall not be so annulled except in the case hereinafter mentioned in that behalf;

(*b*) the power to annul shall be exercisable only in manner by this chapter directed.

Old Act:—S. 16 of Act VIII, of 1866 B. C., and s. 66 of Act VIII of 1869 B. C.

Patni tenure:—It is not quite correct to say that the provisions of this chapter do not apply to patni tenures. All that s. 195 (*e*) *post*, provides is that "nothing in this Act shall affect any enactment relating to patni tenures, in so far as it relates to those tenures." The section does not say that nothing in this Act shall *apply* to patni tenures, but that nothing shall *affect* the patni enactment by which it is obviously intended that provisions of this Act do not modify or alter or control the *patni* enactments, *e. g.*, the patni tenures still contiue to be saleable under the special procedure of Reg. VIII of 1819, Reg. 1 of 1820 and Act VIII of 1865 (B. C.). But from this it does not follow that provisions of this Act do not apply to patni tenures. These provisions may apply to patni tenures, over and above the summary procedure of the patni enactments. For a similar construction under Act XV of 1877, see Golap Chand *v.* Kristo Chunder, I. L. R., 5 Cal., 314; Khoselal v. Gunesh Dutt, I. L. R., 7 Cal., 690; Niajabutulla *v.* Wajid Ali, 10 C. L. R., 333. The provisions of this Act so far as they do not interfere with the patni law in respect of patni tenures, apply to them.—Durga Prasad Bandopdhya *v.* Brindaban Rai, I. L. R., 19 Cal., 504. Under sec. 195 (*e*) nothing in this Act affects any enactment relating to patni tenures, in so far as it relates to those tenures. Putni taluks are, therefore. still saleable under Reg. VIII of 1819.—Gyanoda Kanth Rai *v.* Bramomayi Dasi, I. L. R., 17 Cal., 162), and Act VIII, B. C., 1865. The

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putnidar is personally liable for the rent, and a transferee of a fractional share of a putni is liable for the rent severally and jointly with the registered tenant if the landlord chooses to recognize him as one of the joint-holders of the patni and he is also liable for the entire rent of the patni.—Sourendro Mohun Tagore *v.* Sarnomayi, I. L. R., 26 Cal., 103.

Where a tenure or holding is sold:—Under the old law a sale in execution of a decree against the registered tenant was held to pass the entire tenure, although other persons recognised by the zemindars as his tenant might be interested in the lease.—Huree Churn Bose *v.* Meharoonissa Bibee, 7 W. R., 318; Forbes v. Protap Singh, 7 W. R., 409; Alimoddeen *v.* Sabir Khan 8 W. R., 60; Bhobo Tarinee Dossee, *v.* Prosonomoye Dossee 10 W. R., 304; Fatima Khatan v. Collector of Tippera, 13 W. R., 433; Sadan Chandra Bose *v.* Guru Charan Bose, 15 W. R., 99; Golam Chunder Dey *v.* Nuddiar Chand Adheekaree, 16 W. R., 1; Grish Chunder Ghose *v.* Kali Tara, 25 W. R., 395; Bissessar Lal Sahoo v. Luchmessur Sing, 5 C. L. R., 477; L. R., 6 I. A., 233. Even where the sale proceedings specified that the rights and interests of certain parties only were sold, it was held that the tenure itself was sold and all the co-sharers were jointly liable.—Alimooddin *v.* Satri Khan, 8 W. R., 60. But if a landlord has recognised a transferee of the tenancy as his tenant, he cannot sell the tenancy for arrears due from the recorded tenant.—Amrita Lal Basu *v.* Saurabi Dasi, 2. W. R. Act X, 86 Miah Jan *v.* Karuna Mayi Debi, 8 B. L. R., 1; Mozon Mollah v Dula Ghazi Kulan, 12 B. L. R., 492, note; Ram Kishor Acharji *v.* Krishna Mani Debi, 23 W. R., 106. Where the sale-certificate and sale proclamation contained a clear and precise statement of what was actually sold namely not the tenure but the right, title and interest of the judgment-debtor, it was held that the tenure did not pass under the sale, but only the right, title and interest of the judgment-debtor.—Dwarkanath *v*, Aloka Chunder Seal, I. L. R., 9 Cal. 641. A sale of a tenure in the possession of a Hindu widow as the heiress of of her husband was held to pass the entire tenure, and the revessionary heir could not follow the estate after her death.—Tilack Chunder Chuckerbutty *v.* Muddun Mohan Jogee 12 W. R., 504; Mohima Chunder Roy Chowdhry *v.* Ram Kishore Acherjee Chowdhry, 23 W. R., 174; 15 B. L. R., 142; Baijun Doobey *v.* Brij Bhookun Lall Awust, I. L. R., 1 Cal., 133; 24 W. R., 306; L. R., 2 I. A., 275; Anund Moyee Dassee *v.* Mohindro Narain Dass 15 W. R., 264. But where, in execution of a decree for arrears of rent, the right, title and interest only of the judgment-debtor had been attached and sold under the Code of Civil Procedure (Act VIII of 1859), the whole tenure was held not to have passed as it would have done had the sale taken place in accordance with the provisions of section 59 of Bengal Act VIII of 1869.—Doolar Chand *v.* Lala Chabel Chand, L. R., 6 I. A., 47; 3 C. L. R., 561. Where it is clear from the proceedings that what is sold, and intended to be sold, is the interest of the judgment-debtor only, the sale must be confined to that interest, although the decree-holder might have sold the whole tenure if he had taken proper steps to do so, or although the purchasers may have obtained possession

Old law.

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of the whole tenure under the sale. But if on the other hand, it appears that the judgment-debtor has been sued as representing the ownership of the whole tenure and that the sale, although purporting to be of the right and interest of the judgment debtor only, was intended to be, and in justice and equity ought to operate, as a sale of the tenure, the whole tenure then must be considered as having passed by the sale; and if the question is a doubtful one on the face of the proceedings or one part of those proceedings may appear inconsistent with another, the Court must look to the substance of the matter, and not the form or language of the proceedings.—Jeolal *v.* Gunga Pershad 10 Cal., 996. See also Panya Chandra *v.* Har Chandra, I. L. R, 10 Cal., 496; Rash Bihari *v.* Piari Mohan, I. L. R., 4 Cal., 346; Nazer Mahomed *v.* Girish Chandra, 2 C. W. N., 251. It is clear that

Present law.

the whole tenure or holding now passes at a sale held in execution of a decree for arrears of rent, subject to the "protected interests" and "incumbrances" referred to in sec. 159. But a sale held in execution of a decree obtained by a co-sharer landlord apparently does not pass the tenure or holding, but only the right, title and interest of the judgment-debtor in consequence of the provisions of sec. 188 of this Act.—Beni Madhub Rai *v.* Jaod Ali Sarkar, I. L. R., 17 Cal, 390; Durga Charan Mandal *v.* Kali Prasanna Sarkar, I. L., R., 26 Cal., 727; 3 C. W. N., 586; Sita Nath Chaterji *v.* Atmaram Kar, 4 C. W. N., 571; Sadagar Sarkar *v.* Krishna Chandra Nath, I. L. R., 26 Cal., 937. Following Jeolal *v.* Gunga Prashed, cited above, it was held in Nitye Behari *v.* Hargovind, I. L. R., 26 Cal., 677 that where a landlord had been in the habit of realising the rent due from the holding in the occupation of the recorded tenant and other persons jointly interested with him, in previous years, from the recorded tenant, and a suit was brought against him only for the rent of a subsequent year, and a decree for rent being obtained, the holding was sold as the right, title and interest of the recorded tenant, *held* that the entire holding should be taken to have passed. Where one of several joint tenants executed a kabuliyat in favour of the landlord and the other tenants acquiesced in the representation of the holding by the tenant who executed the kabuliyat, and the landlord sued him only for the rent and in execution of that rent decree attached the entire holding, and the other tenants made no attempt to get them recognised or to pay the arrears; *held* that the attachment covered the entire holding unless there was fraud or collusion on the part of the landlord,—Rajani Kant *v.* Uzir Bibi, 7 C. W. N. 170. See also Tara Lal Singh *v.* Sarobar Singh I. L. R., 27 Cal., 407, P. C., where the attachment was under Bengal Act VIII of 1865. Where the proceedings were taken under the provisions of the Bengal Tenancy Act, and application made for the simultaneous issue of the order of attachment and proclamation as provided in s. 163, but the property was wrongly described as the right, title and interest of the debtor in the tenure, although in the schedule attached to each it was specified as "the lot," or property itself "in arrears," *held* that the tenure passed by the sale and not merely the right, title and interest of the debtor.—Akhoy Kumar *v.* Bejoy Chand, I. L. R., 29 Cal., 813. The terms "right, title and interest of the

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debtors" as used in a sale certificate and an order confirming the sale must be construed with reference to the circumstances under which the suit was brought and the true meaning of the decree under which the sale took place as well as the proceedings leading up to the sale.—*Ibid.* See also Jatindra Mohun *v.* Jugal Kishore, 7 Cal., 357. But where in execution of a certificate obtained under the Public Demands Recovery Act taken against the recorded tenant, the landlord put the holding to sale; *held* that the right, title and interest of the recorded tenant alone and not the entire holding passed by the sale and that the interest of the other joint tenants was not affected by the sale.—Rupram *v.* Iswar Namasudra, 6 C. W. N., 302. Similarly the sale in execution of a decree against some of the heirs of the last recorded tenant was held not to pass the Jama, but only the right, title and interest of the judgment-debtors, the landlord having for sometime accepted the rent from all the heirs of the deceased recorded tenant. —Ananda Kumar Laskar *v.* Hari Das Halder, I. L. R. 27 Cal 645; 4 C. W. N., 608.

A co-sharer selling a tenure or holding for his share of rent:—A sharer in a joint undivided estate, dependent taluk or other similar tenure, cannot cause the tenure itself to be sold in execution of a decree for his share of the rent; he can only sell the rights and interests of the tenant in such under-tenure, so far as his own share is concerned. The tenure will be sold under the ordinary procedure of the Court for the sale of immoveable property. Where a decree-holder is only a sharer in a joint undivided estate, and the property sold is a share in a *guntee* tenure, the sale was declared to have taken place under this section, under which only the rights and interests of the defaulter can pass.—(Meertunjoy Chowdhry *v.* Khetternath Ray, 5 W. R. (Act X), 71; Nundolal Ray *v.* Gooroo Churn Bose, 15 W. R., 6.; Gobind Chunder *v.* Ram Chunder, 22 W. R., 421. See also Ramjiban Choudhri *v.* Piari Lal Mandal, 4 W. R, Act X, 30; W. R., 6; Ghulam Chandra De *v.* Nadiar Chand Adhikari, 16 W. R., 1; Miahjan *v.* Karunamayi Debi, 8 B. L. R., 1; Mohendro Kumar Datta *v.* Hira Mohan Kundu, I. L. R., 7 Cal., 723; Krishna Chandra Ghosh *v.* Rai Krishna Bandopadhya, I. L. R., 12 Cal., 24; Bhaba Nath Rai *v.* Durga Prasanno Ghosh, I. L. R., 16 Cal., 326). Where decrees for arrears of rent had been obtained by fractional shareholders in a tenure, and in execution thereof a moiety of the tenure had been sold, it appeared that the other moiety had been sold at the same time in execution of a mortgage-decree against some of the judgment-debtors in the rent-suit. On an objection being taken to the confirmation of such sale on the ground that the whole tenure should have been sold in execution of rent-decrees, it was held that all that the decree-holders were entitled to have sold was the right, title and interest of their judgment-debtors, and that they were in the position of ordinary creditors having no lien on the tenure; and that, consequently, the mortgagor being entitled to enforce his lien against the moiety covered by his mortgage, the sale of the remaining moiety in satisfaction of the rent decrees was a good sale, and could not be set aside.—Mohendra Coomar *v.* Heera Mohan and Ishanesvari Dasi *v.* Gopal Das, I. L. R., 7 Cal., 723. A portion of a tenure cannot be the

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subject of a sale under s. 64, Bengal Act VIII of 1869, so as to give the purchaser the same privilege as he would acquire by the purchase of an entire tenure under ss. 59 and 60. A landlord who was in receipt of a half share of the rent of a certain tenure caused that share of the tenure to be sold in execution of a decree for arrears of rent. After such sale *A*, the purchaser, took possession. Subsequently the tenant executed a mortgage, and a decree being obtained by the mortgagee the whole tenure was brought to sale in execution thereof and purchased by the mortgagee, who proceeded to oust A. In a suit by *A* to recover possession of his share of the tenure on the footing of his purchase, it was held that he could not make out a title to the half tenure with the privilege attaching to the purchase of an entire tenure under ss. 59 and 60 of Bengal Act VIII of 1869, and that as it appeared that the mortgagor whose rights and interests only were thus sold, was only one of several co-sharers, in the absence of the co-sharers who were not parties to the suit, A was not entitled to the relief he sought.—G. M. Reily *v.* Hur Chunder Ghose, I. L. R., 9 Cal., 722, the recorded tenant of a *mourasi mokurari* tenure died leaving *G* his son and heir, who sold the tenure, which eventually came into the plaintiff's father, and afterwards on his death became vested in the plaintiffs, but niether they nor their father, though they made attempts to do so, ever obtained the registration of their names as tenants. *R*, one of the two shareholders in the zemindari, brought a suit for arrears of rent of the tenure against *G*, and in execution of the decree he obtained in that suit the tenure was sold and purchased by the other zemindar, by whom the plaintiffs were dispossessed. It was held that the plaintiffs were not precluded by the fact that their names were not registered as tenants, under s. 26 of the Rent Act, from bringing a suit to recover possession of the tenure. The holder of the decree, in execution of which the tenure was sold, assuming him to be only a shareholder in the zemindari right, had no right under s. 64 to sell the tenure but only the interest of the person against whom the decree was passed. The *onus* was on the defendant to show that the sale under the decree for rent was of such a nature as to give him priority over the plaintiffs.—Kristo Chunder *v.* Oajkristo, I. L. R., 12 Cal., 24; see also Ashanulla Khan Bahadur v. Rajandra Chander, I. L. R., 12 Cal. 464. In Beni Madub Roy *v.* Jaoroli Sarkar, I. L. R., 17 Cal., 390, F.B., it was held that an attachment of a tenure or holding in execution of a decree obtained by a fractional co-sharer for arrears of the rent of his separate share. is not such attachment as is contemplated by s. 170 of the Bengal Tenancy Act. A *fortiori*, a sale under such a decree would pass, not the tenure or holding, but only the right, title and interest of judgment-debtor. Where landlords seek to take the benefit of this Act, they must act in concert; and, where one of several co-sharers in a zemindari thinks fit to pursue his remedies to recover his share of the rent, he must pursue them under the ordinary law of the country and independently of the Tenancy Act.—*Ibid.* A decree obtained by some of several co-sharers for rent cannot be regarded as a decree under the Bengal Tenancy Act, and the proceedings in execution thereof can only be in accordance with the provisions of the Code of Civil Procedure.—Durga Charun *v.* Kali Prosunno, I. L. R., 26 Cal., 727;

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3 C. W. N., 586; Sitanath *v.* Atmaram, 4 C. W. N., 571; Sadugar *v.* Krishna Chandra, I. L. R., 26 Cal., 937; Kedarnath *v.* Ardha Chandra, 5 C. W. N., 763 (at p. 766). In a suit to recover rent for four years the plaintiffs constituted the entire body of landlords as regards the claim for the first two years, but only fractional co-sharers as regards the claim for the last two years; *held*, that the decree passed was not a rent-decree under the ordinary law.—Shaikh Naimuddin *v.* Srimanta Ghose, 6 C. W. N., 124. But where a decree for the entire rent of a tenure is obtained by one of several co-sharers by making the others party defendants, the decree has the same effect as if the decree has been obtained by all the co-sharers.—Chandra Sekhar *v.* Ranee Manjher, 3 C. W. N. 386. A lease of an undivided share in several parcels of land does not create a holding within the meaning of the Bengal Tenancy Act; accordingly when the interest of such a lessee is sold in execution of a decree for arrears of rent obtained by the landlord, the purchaser is not the purchaser of a holding within the meaning of s. 159.—Asadulla *v.* Gagan Molla, 6 C. W. N., lxxxiv. The term "parcel" or "parcels" in s. 3, cl. 9 of the Act means "entire parcel" or "entire parcels," and is not intended to include an undivided fractional share in a "parcel" or "parcels" of land; undivided shares in parcels of land cannot therefore constitute distinct "holdings"—Hurry Churn *v.* Rajah Ranjit 1 C. W. N., 521. I. L. R., 25 Cal., 917; see also Baidyanath *v.* Sheik Jhin, 2 C. W. N., 44; I. L. R., 25 Cal., 917; Panchanan *v.* Raj Kumar, I. L. R., 19 Cal., 610; Govinda Chandra *v.* Hamedulla, 7 C. W. N., 670.

Sale of a share of tenure under Bengal Act VIII of 1869:—Under section 64 of Bengal Act VIII of 1869, a share of an under-tenure could be sold, although the purchaser of a share of a tenure did not obtain the property free from incumbrances.—Reily *v.* Hur Chandra, I. L. R., 9 Cal., 722; he was held to acquire under section 64 of Bengal Act VIII of 1869 the judgment-debtor's rights and interests.—Ahsadulla *v.* Rajendra Chandra, I. L. R., 12 Cal., 464. And to become jointly liable for the rent with the other under-tenants.—Gobind Chandra *v.* Ram Chandra 22 W. R., 421.

Tenure or holding cannot be resold a second time:—Where a tenure or holding has once been sold in execution of a decree for arrears of rent due in respect thereof; it cannot be put up to sale again in execution of another decree for arrears. The purchaser at the first sale acquires it free of all liability created upon it by the default of the previous holder.—Faez Rahman *v.* Ram Singh, I. L. R., 21 Cal., 169; Ram Chandra *v.* Samir Gazi, I. L. R., 20 Cal., 25.) The charge in respect of any rent falling due between the date of suit and the date of sale in satisfaction of the decree passed therein is transferred from the tenure to its sale-proceeds. *Ibid.* Nor when a tenure has once been sold for its own arrears can it again be put up to sale for the arrears due on account of a previous period.—Latefan *v.* Meanjan, 6 W. R., 112; Pran Gour *v.* Hemanta Kumari, I. L. R., 2 Cal., 597; But see ss. 66, 163, 169 of this Act. Where the landlord, having once sold the property in execution of his decree, puts it up again to sale, and another person purchases it without any

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title against the first purchaser, he (the subsequent purchaser) is nevertheless entitled in equity to recover, from the landlord-defendant, the purchase-money paid by him, without instituting a separate suit against him for the recovery of damages.—Ram Saran *v.* Mahomed Latif, 3 C. W. N., 6.

Rent charge against mortgage heir:—When a tenure is sold in execution of mortgage decree, the rent being under s. 65 a first charge upon it, it passes to the purchaser subjec to this charge, and can be sold in execution of the decree for the rent which accrued due previously to the date on which the sale was confirmed—Maharani Dasya *v.* Harendro Lal Rai, 1 C. W. N., 458. So, where a plaintiff, in execution of a mortgage-decree, purchased the tenure mortgaged, and then paid the money due under a decree obtained by the landlord against the tenure-holder for arrears of rent for the period anterior to the confirmation of sale, he cannot proceed against the mortgagor. Ordinarily speaking, the proprietor of an estate cannot be said to represent the whole estate after he has mortgaged it; and this distinguishes the case of a mortgagor as representing an estate from that of a Hindu widow or *shebait*, who is held to represent the estate so as to bind the reversioner or the succeeding *shebait*:—Shoshi Bhusan *v.* Gagan Chandar, I. L. R., 22 Cal 364.

Effect of reversed or void decree on sale:—Where a plaintiff had obtained an *ex-parte* decree against a defendant, and in execution of that decree had sold the defendant's under-tenure, and this *ex-parte* decree was afterwards set aside, it was held that the sale was valid, though the decree under which it had taken place was invalid, and the defendant was not allowed to recover the under-tenure, unless he could prove that the purchase was not a *bonâ fide* one and the purchaser was acting in collusion with the decree-holder.—Jan Ali *v.* Jan Ali Chowdhry I. B. L, R., 56; 10 W. R., 154. Peacock, C. J., in delivering judgment, referred to the case of Chunder Kanta Surma *v.* Bissesvar Surma Chuckerbutty, 7 W R., 312, in which Norman, J., had made the following remarks: "It is imprortant to observe that, if a sale takes place in execution of a decree in force and is valid at the time of the sale, the property in the thing sold passes to the purchaser; and if the decree or judgment be afterwards reversed, the reversal does not affect the validity of the sale or the title of the purchaser." No suit will lie to set aside the sale of an estate in execution of a decree for arrears of rent at enhanced rat according to a prior decree obtained *ex-parte* for enhancement, subsequeatly revers on special appeal. This case was decided under Act X of 1859, and Norman, says: "We think it clear that the lower Courts were right in dismissing the suit The new plaintiff had his remedy under section 58 of Act X of 1859, to apply to set aside the judgment within 15 days after the process for enforcing the judgment was executed, if the story he now sets up is true. He might ha paid the money into Court, or applied to stay the proceedings in the second suit pending the appeal in the first. He had no right to hold back and pay nothing, and ha done so, he must take the consequence. As it is the decree became final, an the sale under it was perfectly regular. And although the defendant is not in position of a purchaser without notice of the proceedings in the suit, we thin

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he has a perfect valid title to the property he has bought. See also Doorga Prosad Pal Chowdhry *v.* Jogesh Prokash Gungopadhya, 4 W. R., (Act X), 38; Peary Monee *v.* Collector of Beerbhum, 8 W. R., 300; Mathura Mohan *v.* Askhoy Kumar, I. L. R., 15 Cal., 557, Rewa Mahton *v.* Ramkishen, I. L. R., 14 Cal., 18 P. C., L. R. 13 I. A., 106. In another case, however, a contrary view was held by the Court, where Morgan, J., says: "On the reversal of the decree in execution of which the sale took place, the sale itself made while that decree under review fell."—Sheik Bhoolloo *v.* Ram Narain Mukerji, Sp., W. R. 129. Where it appeared that the decree was barred by limitation, the sale in execution of such decree was declared invalid.—Golam Asgar *v.* Lukhi Moni Debi, 5 B. L. R., 68; 13 W. R., 273; so also when the original decree was passed without jurisdiction.—Jadu Nath Kundu Chowdry *v.* Braja Nath Kundu, 6 B. L. R., Ap., 90; or when the decretal amount was deposited in Court before sale.—Afzulan *v.* Gournarain, 6 W. R., Act X, 59; B. L. R. F. B. Sup. VII. 519); or when judgment-debtor had paid the judgment creditor the decretal amount before sale.—Pat Dasi *v.* Sharup Chand, I. L. R., 14 Cal., 376. The purchaser of an under-tenure may sue in the Civil Court to set aside a sale of the under-tenure in execution of a decree for arrears of rent, under Act X of 1859, on the ground that such decree was obtained by fraud subsequent to the purchase.—Ganga Das Datta *v.* Ram Narain Ghosh, B. L. R., F. B., 625; Nil Mani Banik *v.* Padda Lochan Chakravartti, B. L. R. F. B, 379; Ram Sundar Pramanik *v.* Prasanna Kumar Basu, B. L. R., F. B., 382; Batulan *v.* Uziran, 8 W. R., 300). A suit by an auction-purchaser to obtain *khas* possession of an under-tenure, which had been sold under Act VIII (B. C.) of 1869, was dismissed on the ground that the suit in which the zemindar had obtained the decree was a fraudulent one, and the purchaser knew that it had been against the wrong party. In special appeal, the provisions of Act X of 1859, s. 106, were pleaded in justification of the zemindar; but it was held that he could not bring such a suit agaist a person other than the one whom he knew to be the proprietor of the under-tenure, and from whom for a series of years he had been receiving rent.—(Nobin Chandra Sen *v.* Nobin Chandra Chakravarti, 22 W. R., 46). The tendency of the later decisions seems to be that the plaintiff is not entitled to obtain the relief, unless the auction-purchaser should be a party to the fraud.—Mathura Mohun *v.* Akhoy Kumar, I. L. R., 15 Cal., 563; Rewa Mathon *v.* Ramkishen I. L. R., 14 Cal., 181; L. R., 13 I. A. 106. In Ram Saran *v.* Mahomed Lateef, 3 C. W. N., 62, in which a plaintiff sued for possession of a holding, but it was decided that the sale at which he had purchased the holding though held in execution of a decree for arrears of rent, was bad, as the landlord had previously sold the holding in execution of a money decree; it was held that the plaintiff was entitled to a refund of the purchase-money from the landlord, and that a separate suit for the purpose was not necessary.

With power to annul "incumbrances, and registered notified incumbrances":—These terms are defined in s. 161 clauses (*a*) and (*b*). *Proviso* (*b*) speaks of the power to annul incumbrances. The sale itself, however, does not cancel the incumbrances but only gives the purchaser a power to do so, of which he may elect to

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avail himself, or which he may lose by not exercising.—Gobind Chunder Bose *v.* Alimoddin, 11 W. R., 160; Modhoo Sudan Koondoo *v.* Ramdhun Ganguli, 12 W. R., 383; 3 B. L. R., A. C., 431. Compare Ranee Surnomayee *v.* Sutish Chunder Roy, 10 Moo. I. A., 123 2 W. R., P. C., 14; Khajah Assanoollah *v.* Obhoy Chunder Roy, 13 Moo. I. A., 317; Kazee Munshee Aftaboodeen Mahomed *v.* Sanioolla, 23 W. R., 245; Rajah Suttya Sarun Ghosal *v.* Mohesh Chunder Mitter, 2 B. L. R., P. C., 30; 11 W. R., P. C., 10; Tara Chand Dutt *v.* Musst. Wakenoonnissa Bibi, 7 W. R., 91; Koylash Chunder Dutt *v.* Jabur Ali, 22 W. R., 29). In Annoda Churan Das Biswas *v.* Mathura Nath Dass Biswas, I. L. R., 4 Cal., 860; 4 C. L. R., 6, a different view was entertained. The Court held in this case that under Bengal Act VIII of 1865, section 16, under-tenures become void *ipso facto* by the sale and are not merely voidable at the option of the purchaser. So in Mohim Chunder Mazumdar *v.* Jotirmoy Ghose, 4 C. L. R., 422. These two decisions have been virtually superseded by the Full Bench decision in the case of Titu Bibi, Munsurunnissa Bibi, Ibrahim Mollah *v.* Mohes Chunder Bagchi, I. L. R., 9 Cal., 683; 12 C. L. R., 304.

Protected interests.

160. The following shall be deemed to be protected interests within the meaning of this Chapter:—

(*a*) any under-tenure existing from the the time of the Permanent Settlement;

(*b*) any under-tenure recognized by the settlement-proceedings of any current temporary settlement as a tenure at a rent fixed for the period of that settlement.

(*c*) any lease of land whereon dwelling-houses, manufactories or other permanent buildings have been erected, or permanent gardens, plantations, tanks, canals, places of worship or burning or burying grounds have been made;

(*d*) any right of occupancy;

(*e*) the right of a non-occupancy-raiyat to hold for five years at a rent fixed under Chapter VI by a Court, or under Chapter X by a Revenue-officer;

(*f*) any right conferred on an occupancy-raiyat to hold at a rent which was a fair and reasonable rent at the time the right was conferred; and

(*g*) any right or interest which the landlord at whose instance the tenure or holding is sold, or his predecessor in title, has expressly and in writing

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given the tenant for the time being permission to create.

The first three clauses (*a*), (*b*), and (*c*), are taken from section 37 of Act XI of 1859 and section 12 of Bengal Act VII of 1868. The interests referred to in clauses (*d*), (*f*) and (*g*) were protected by section 66 of Bengal Act VIII of 1869. Clause (*e*) is new.—See Nilmadhab *v.* Shibu Pal, 13 W. R., 410.

Clause (a):—In a suit for ejectment under s. 37 of Act XI of 1859 by a purchaser at a revenue sale, the defence was that the defendants held the land as a subordinate taluk which had been in existence and in their possession and that of their predecessors since the time of the Permanent Settlement; it was found as a fact that the tenure was in existence in the year 1798-99; the plaintiff's suit being dismissed, it was contended in second appeal that the facts found could not protect the tenure. in the absence of proof that the tenure was in existence at the date of the Permanent Settlement; *held*, that although in the first intance the burden of proof is upon the defendants, the fact that defendants were in possession for such a length of time, was sufficient to discharge the onus and establish that the tenure was protected; that in a case like this no hard-and-fast rule can be laid down as to when the burden of proof shifts from one side to the other and that such case must be governed by its merits.—Nitya Nund *v.* Banshi Chunder, 3 C. W. N., 341.

Clause (c) Permanent structure:—Clause (*c*) must be read with section 167, sub-section (4) *post*. The clause corresponds with the 4th exception in section 37 of Act XI of 1859. In a suit to avoid an under-tenure by the purchasers at an auction-sale for arrears of Government revenue the defendants contended that the tenure was created prior to the Permanent Settlement, and that some portions of the land comprised in it were covered with permanent structures and improvements, and that, accordingly, it was protected under exceptions 1 and 4 to s. 37 of Act XI of 1859, but the lower Court gave a decree to the plaintiff and annulled the under-tenure. *Held* by White, J., that, notwithstanding a party may fail to show that his tenure was created prior to the Permanent Settlement, yet he is entitled to the benefit of the 4th exception in respect of any permanent structure that may be upon his holding.—Bhoogo Bibi *v.* Ram Kanto Roy Chowdhry, I. L. R., 3 Cal., 293; Brojosundar Biswas *v.* Gouri Prosad Roy, S. D. A. 645; so Govind Chunder *v.* Joy Chunder, I. L. R., 12 Cal., 329. The Court observed in this case:—"The first point for our consideration is whether lands on which gardens have been made are protected by Act XI of 1859, section 37, from the effect of a sale for arrears of revenue, unless they have been expressly leased for that purpose. No doubt three successive Revenue Sale Laws, Reg. X of 1822, Act XII of 1841 and Act I of 1845, were to this effect, but the language of Act XI of 1859 is different, and is capable of the more liberal interpretation in favour of the tenant. This construction has been adopted by Birch and Mitter, JJ., in unreported special appeal, 1796 of 1876, Sheik Joofail Ali *v.* Ram Kant Roi Chowdhuri, and three appeals decided simultaneously; and also by White and Mitter, JJ., in the case of Bhogo Bibi *v.* Ram Kant Roy Chowdhury. We

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were at one time inclined to doubt the correctness of this opinion, but after examination of proceedings in the Legislative Council, we have come to the conclusion that the alteration in the terms of the law was deliberate, so as to protect all tenants coming within the terms specified." The benefit of cl. (*c*) is limited to improvements effected *bona fide* and to permanent buildings erected before the sale; it does not extend to anything subsequently constructed merely for the purpose of defeating the rights of the auction-purchaser. Subject to this reservation, it does not matter whether the improvements have been effected by the present holder or by some previous occupier.—Asgar Ali *v.* Amut Ali, I. L. R., 8 Cal., 110. A lease of tank without any portion of the surrounding land is not protected under cl. 4, sec. 37 of Act XI of 1859, as it is not within the meaning of that clause a lease of land whereon a tank has been excavated :—Asmat Ali *v.* Hasmat Khan, 2 C. W. N., 412.

Clause (g):—SS. 3 and 4 of Regulation VIII of 1819 cannot be so read as to hold that, by them, landlord expressly gives, the dur-putnidar permission to create a mortgage within the provisions of s. 160 (*g*) of the Bengal Tenancy Act.—Akshoy Kumar *v.* Maharajah Bejoy Chand, 29 Cal.. 813, s. c. 6 C. W. N., ccxlix; a mortgage created by a dur-putnidar of his interest in the taluk does not therefore amount to a protected interest within the meaning of s. 160 (*g*) of the Bengal Tenancy Act.—*Ibid.* Where a putni kabuliyat contained the clause "If I should let out this mehal in dur-putni to any person, such dur-putnidar shall act according to the terms of my Kabuliyat," *held* that even assuming that the putni pottah contained the counterpart of the clause, the words did not amount to an express or implied permission to create a sub-tenure, and the knowledge of the proprietor of the creation of the sub-tenure and the acceptance by him of the rent of the putni taluk through the sub-tenure holder was not sufficient to constitute the sub-tenure a protected interest within the meaning of this section.—Mahammad Kaem *v.* Naffar Chunder Pal, 9 C. W. N., 803.

161. For the purposes of this Chapter :—

Meaning of "incumbrance" and "registered and notified incumbrance."

(*a*) the term "incumbrance," used with reference to a tenancy, means any lien, sub-tenancy, easement, or other right or interest created by the tenant on his tenure or holding, or in limitation of his own interest therein, and not being a protected interest as defined in the last foregoing section;

(*b*) the term "registered and notified incumbrance," used with reference to a tenure or holding sold or liable to sale in execution of a decree for an arrear of rent due in respect thereof, means an incumbrance created by a registered instrument of which a copy has, not less than three months before the accrual of the arrear,

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been served on the landlord in manner hereinafter provided.

All rights or interests created by the tenant on his tenure or holding which are not included in section 160 come under the present section.

Lease: An incumbrance :—A lease is an incumbrance within the meaning of s. 161 as much as a sale, gift or mortgage.—Jogeshwar Majumdar *v.* Abid Mahomed, 3 C. W. N., 13; Gopendra Chandur *v.* Makaddun Hossein, I, L. R., 21 Cal., 702.

Exchange of land: An incumbrance :—Exchange of land is an incumbrance within the meaning of this section.—(Chandu Sahai *v.* Kali Prosunno Chakravarti, I. L. R., 23 Cal., 254.)

A mortgage arising under section 171 is not an "incumbrance" :—An incumbrance liable to be set aside under this section must be the creation of the tenant, having an interest in a tenure or holding which would be voidable, if such tenure or holding were sold.—Pasupati Mohapatra *v.* Narayani Dassi, I. L. R., 24 Cal., 537; 1 Cal., W. N., 519. If the tenant pays into Court under the provisions of section 171 (*post*), the amount of the decree, his lien on the property cannot be set aside by an auction-purchaser as an incumbrance—*Ibid.*

Mortgagee in possession :—Only "registered and notified" incumbrances are protected against annulment [see section 159, proviso (*a*), *ante*, page 566]. The mere fact that a mortgagee has been put into possession of the property on the basis of a usufructuary mortgage will not give him protection unless the case comes under clause (*b*) of section 161 :—Nabin Chand Nuskar *v.* Banse Nath Paramanick I. L. R., 21 Cal., 722.

Notifying incumbrances to landlord:—As to the notifying of incumbrances to the landlord, see section 176, *post*.

Adverse possession :—It has been held that a right created in a person by adverse possession against the sold-out proprietor is an incumbrance which a purchaser at a revenue sale, acquiring rights under sec. 37 of Act XI of 1859 (or under the older sale-law repealed by that Act) is entitled to set aside;—Karmi Khan *v.* Brojo Nath, I. L. R., 22 Cal., 244 (at p. 251); see also Thakoor Dass *v.* Nabin, 15 W. R., 552: Goluck Monee *v.* Huro Chunder, 8W. R., 62; Narain Chunder *v.* Tayler, I. L. R., 4 Cal., 103. Such a right has also been held to be an incumbrance within the meaning of the Putni Regulation (VIII of 1819); Khantomoni *v.* Bijoy Chand, I. L, R., 19 Cal., 787; Lukhmee *v.* Colletor of Rajshaya, S. D. A. 1851, p. 116; Ram Suran *v.* Bejoy Govind, S. D. A., 1852, p. 824.

Sale does not ipso facto cancel incumbrance:—A sale purporting to be under this chapter does not, *ipso facto*, cancel incumbrances. Notice must be given under sec. 167 :—Beni Prosad *v.* Rewal Lall, I. L. R., 24 Cal., 746.

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Application for sale of tenure or holding. XIV of 1882.

162. When a decree has been passed for an arrear of rent due for a tenure or holding, and the decree-holder applies under section 235 of the Code of Civil Procedure for the attachment and sale of the tenure or holding in execution of the decree, he shall produce a statement showing the pargana, estate and village in which the land comprised in the tenure or hoding is situate, the yearly rent payable for the same and the total amount recoverable under the decree.

The High Court has framed the following rule under sec. 287 of the Civil Procedure Code :—

"Every person applying under sec. 162 of the Bengal Tenancy Act. (VIII of 1885) for the simultaneous attachment and sale of a tenure or a holding of a raiyat holding at fixed rates, or applying only for the sale of such tenure or holding already under attachment, shall in such application specify the registered and notified incumbrances subject to which the tenure or holding is to be sold. Such specification shall be verified in the manner prescribed by the Code of Civil Procedure for the verification of plaints by the holder of the decree in execution of which the tenure or holding is to be sold, or by some other person (approved of by the Court), if the Court be satisfied that he is acquainted with the facts mentioned in it." (*Calcutta Gazette* of August 18th. 1886, Part I, p. 939, and High Court's General Rules and Circular Orders (Civil), p. 32).

Order of attachment and proclamation of sale to be issued simultaneously. XIV of 1882.

163. (1) Notwithstanding anything contained in the Code of Civil Procedure, when the decree-holder makes the application mentioned in the last foregoing section the Court shall, if under section 245 of the said Code it admits the application and orders execution of the decree as applied for, issue simultaneously the order of attachment and the proclamation required by section 287 of the said Code.

(2) the proclamation shall, in addition to stating and specifying the particulars mentioned in section 287 of the said Code, announce—

(*a*) in the case of a tenure or a holding of a raiyat holding at fixed rates, that the tenure or holding will first be put up to auction subject to the registered and notified incumbrances, and will be sold subject to those incumbrances if the sum bid is sufficient to liquidate the amount of the decree and costs, and that otherwise it will, if the decree-

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holder so desires, be sold on a subsequent day, of which due notice will be given, with power to annul all incumbrances; and

(*b*) in the case of an occupancy-holding, that the holding will be sold with power to annul all incumbrances.

(3) The proclamation shall, besides being made in the manner prescribed by section 289 of the said Code, be published by fixing up a copy thereof in a conspicuous place on the land comprised in the tenure or holding ordered to be sold, and shall also be published in such manner as the Local Government may, from time to time, direct in this behalf.

(4) Notwithstanding anything contained in section 290 of the said Code, the sale shall not, without the consent in writing of the judgment-debtor, take place until after the expiration of at least thirty days, calculated from the date on which the copy of the proclamation has been fixed up on the land comprised in the tenure or holding ordered to be sold.

Sub-section(3):—The Local Government has issued the following notification under this sub-section:—"Under sec. 163 (3), Bengal Tenancy Act, the Lieutenant-Governor is pleased to direct that the proclamation referred to in that section as required by section 287 of the Civil Procedure Code, Act XIV of 1882, shall in addition to the place prescribed in sec. (3) of the Bengal Tenancy Act, and in sec. 289 of the Code of Civil Procedure, be also published in the *mal kachari*, or rent-office of the estate, and at the local thana." (*Calcutta Gazette*, March 3rd, 1886, Part I, p, 142).

Stay of execution of rent decree while appeal pending:—A rent-decree which is sought to be executed against a tenure or holding is a decree for money within the meaning of section 546 of the Code of Civil Procedure, and its execution is liable to be stayed until the disposal of any appeal which may be pending against the decree.—Banku Bhary Sanyal *v.* Syama Churn Bhuttacharjee, I. L. R., 25 Cal., 322.

Proclamation of sale: When a tenure is advertised for sale in execution of a decree for arrears of rent, it is not necessary for the decree-holder to specify the rate of interest in the sale proclamation.—Raj Narain Mitra *v.* Panna Chand, 7 C.W. N., 203. Where there was a stipulation in a lease that the lessee should pay a sum of ten rupees in default of delivery to the landlord of a certain quantity of molasses, it was *held* that the stipulation was merely a personal covenant by the lessee, and that, the rent mentioned in the sale proclamation not having included the sum in question, the auction-purchaser was not bound to pay the sum.—*Ibid*.

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Sale of tenure or holding subject to registered and notified incumbrances, and effect thereof.

164. (1) When a tenure or a holding at fixed rates has been advertised for sale under the last foregoing section, it shall be put up to auction subject to registered and notified incumbrances; and, if the bidding reaches a sum sufficient to liquidate the amount of the decree and costs, including the costs of sale, the tenure or holding shall be sold subject to such incumbrances.

(2) The purchaser at a sale under this section may, in manner provided by section 167, and not otherwise, annul any incumbrance upon the tenure or holding not being a registered and notified incumbrance.

Bidding must be actual:—"Bidding" in this section means a bid which either has been accepted or is open to acceptance, and does not include a bid which has been withdrawn before acceptance and which has been cancelled by the bidder.—Appeal from order No. 69 of 1887, Nobo Comar Mookerjee *v.* Kissory Dassee, decided by Petheram, C. J., and Ghose, J., on 30th May 1887 (unreported).

Sale of tenure or holding with power to avoid all incumbrances, and effect thereof.

165. (1) If the bidding for a tenure or a holding at fixed rates put up to auction under the last foregoing section does not reach a sum sufficient to liquidate the amount of the decree and costs as aforesaid, and if the decree-holder thereupon desires that the tenure or holding be sold with power to avoid all incumbrances, the officer holding the sale shall adjourn the sale and make a fresh proclamation under section 289 of the Code of Civil Procedure, announcing that the tenure or holding will be put up to auction and sold with power to avoid all incumbrances upon a future day specified therein, not less than fifteen or more than thirty days from the date of the postponement; and upon that day the tenure or holding shall be put up to auction and sold with power to avoid all incumbrances.

XIV of 1882.

(2) The purchaser at a a sale under this section may in manner provided by section 167 and not otherwise, annul any incumbrance on the tenure or holding.

The person who purchases property under this section is different from the person who claims to have a charge or incumbrance on it.—Masatulla Mundal *v.* Jan Mahmad, I. L. R., 28 Cal., 22; 4 C. W. N., 735.

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Sale of occupancy-holding with power to avoid all incumbrances and effect thereof.

166. (1) When an occupancy-holding has been advertised for sale under section 163, it shall be put up to auction and sold with power to avoid all incumbrances.

(2) The purchaser at a sale under this section may, in manner provided by the next following section, and not otherwise, annul any incumbrance on the holding.

Difference between purchases at sales under sections 164 and 165 respectvely:—The purchaser at a sale under section 164 can annul all incumbrances save and except such as are registered and notified incumbrances. But when the sale takes place under section 165, *i. e.* at an adjourned sale of a tenure or a holding at fixed rates, the purchaser has the power to annul all incumbrances, including registered and notified incumbrances.

Procedure for annulling incumbrances under the foregoing sections.

167. (1) A purchaser having power to annul an incumbrance under any of the foregoing sections and desiring to annul the same, may, within one year from the date of the sale or the date on which he first has notice of the incumbrance, whichever is later, present to the Collector an application in writing, requesting him to serve on the incumbrancer a notice declaring that the incumbrance is annulled.

(2) Every such application must be accompanied by such fee for the service of the notice as the Board of Revenue may fix in this behalf.

(3) When an application for service of a notice is made to the Collector in manner prescribed by this section, he shall cause the notice to be served in compliance therewith, and the incumbrance shall be deemed to be annulled from the date on which it is so served.

(4) When a tenure or holding is sold in execution of a decree for arrears due in respect thereof, and there is on the tenure or holding a protected interest of the kind specified in section 160, clause (*c*), the purchaser may, if he has power under this chapter to avoid all incumbrances, sue to enhance the rent of the land which is the subject of the protected interest. On proof that the land is held at a rent which was not at the time the lease was granted a fair rent, the Court may enhance the rent to such amount as appears to be fair and equitable.

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This sub-section shall not apply to land which has been held for a term exceeding twelve years at a fixed rent equal to the rent of good arable land.

Sub-section(1). Annulment of incumbrances.—This section applies to a case where the incumbrancer is a third party and not where purchaser and incumbrancer are identically the same person. And where the purchaser is the incumbrancer himself, no notice is necessary to be given under this section for annulling the incumbrance.—Hem Chandra Chowdhury, *v.* Tafazzel Hossin Khan. 8 C. W. N., 332. It was decided *ex parte* in Goluk Chander *v.* Ram Sankur, 4 C. W. N., 268, that the section applies even when the incumbrancer and the purchaser are the same persons. This was, however, dissented from in Masatulla Mandal *v.* Jan Mahamed, I. L. R., 28 Cal., 12; 4 C. W. N., 735, in which it was decided that when the mortgagee of a property purchases it at a sale in execution of rent decree under sec. 165, and takes out the balance of the surplus sale proceeds, and applies it *pro tanto* to the satisfaction of a mortgage decree which he had obtained, his mortgage lien on the property is extinguished by his purchase, though he may not have taken steps to annul the incumbrance under sec. 167. It was further held in that case that under sec. 101 of the Transfer of property Act which is of general application, his encumbrance is extinguished unless he evinces an intention to keep it alive. The mode prescribed by section 167 is the only mode in which incumbrances can be annulled by purchasers of tenures and holdings for arrears of rent.—Sashi Bhusan Guha *v.* Gagan Chandra Saha, I. L. R., 22 Cal., 364; Chandra Sakai *v.* Kali Prasanna Chakravarti, I. L. R., 23 Cal., 256. A sale with power to annul incumbrances does not *ipso facto* cancel the incumbrances. Notice must be given according to the procedure laid down in section 167.—Beni Prasad Sinha *v.* Rewat Lal, I. L. R., 24 Cal., 746; see also Shoshi Bhusan *v.* Gogan Chunder, I. L. R., 22 Cal., 364 Chandra Sirkar *v.* Kali Prosanno, I. L. R., 23 Cal., 254, within one year of the purchaser becoming aware of the incumbrance,—(Gopi Nath Biswas *v.* Radha Shyam Poddar, 5 C. W. N., lxxx.) The service of the notice under sec. 167 is sufficient under sec. 164 to annul the incumbrance: it is not necessary to bring a regular suit to extinguish it, and a purchaser at a sale may give a valid notice under sec. 167, even though he may have transferred his rights in the property before the notice is given.—Piary Lal Rai *v.* Moheswari Debi, I. L. R., 25 Cal., 551. The Act confers a special privilege on the purchaser, and he is not entitled to that privilege unless he strictly complies with that provision of the Act. It follows, therefore, that when an application is made to serve the notice on a wrong person, it is of no effect.—Nritya Gopal Hazra *v.* Golam Rasool I. L. R., 28 Cal., 180. A subsequent application, made after the expiry of one year, to serve the statutory notice on the right person, would be barred by

The section applies when the incombrancer is a third party.

Only mode to annual incumbrance.

Notice to cancel incumbrance.

Limitation.

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limitation.—*Ibid.* Ss. 184 and 185 of the Bengal Tenancy Act have not the effect of extending the provisions of s. 7 of the Limitation Act to an application under s. 167.—Akshoy Kumar *v.* Maharaja Bejoy Chand, 6 C. W. N., ccxlix. An under-raiyat's lease which is unregistered is not an incumbrance and need not be annulled under this section.—Piary Mohan Mukhurji *v.* Badal Chandra Bagdi, 5 C. W. N., 310; I. L. R., 28 Cal., 205.

Collector :—The functions of a Collector under section 167 are purely ministerial and he has no power to allow an application made against a wrong person to be amended after the period of limitation has expired. A sub-divisional officer not specially appointed by the local Government to discharge the functions of a Collector under sec. 167, has no power to receive an application, nor has he jurisdiction to issue a notice annulling an incumbrance.—Mahabat Singh *v.* Umahil Fatima. I. L. R., 28 Cal., 66. Where an application for service of a notice under this section was made to the Collector and the application and notice were sealed with the Collector's seal though it was signed by a Deputy Collector "for the Collector" and was received by the Collector in charge, and the notice was thereafter issued from the Collectorate *held* that there was no irregularity in the service of the notice.—Mahammed Kæm *v.* Nafar Chunder Pal, 9 C. W. N., 803.

Sub-section (2). Fees :—Fees for the service of the notice are to be levied in accordance with rules 1 to 4, Chapter VII of the Government Rules under this Act. The Board of Revenue have fixed no special fees for the service of the notice. See Appendix.

Sub-section (3). Mode of Service :—For the mode of service of the notice of the incumbrance, see rule 3, Chap. I of the Government Rules under the Act. See Appendix.

Terms of Notice :—No form of notice has been prescribed. A notice to annul an incumbrance is not bad, though it does not specify the particulars of the land held by the tenant or the rent payable by him and though it is addressed to several tenants jointly.—Jagabandhu Mazumdar *v.* Rasho Mañjan Dasya, 5 C. W. N., 272.

Right of mortgagee :—In the case of a rent sale under this Act, with express power to the purchaser to annul all incumbrances, so long as such power remains in the purchaser, the lien of a mortgagee is in jeopardy. In such a case the mortgagee may abandon his lien and ask to have it transferred to the surplus sale proceeds. See Transfer of Property Act, s. 73, right of mortgagor to have his lien transferred to sale-proceeds :—Nim Chand Baboo *v.* Ashutosh Dutt 9 C. W. N., 117. After a mortgagee has enforced his lien and obtained his decree, it cannot be held that the decree would remain as an incumbrance on the tenure which can be avoided under s. 167.—Akshoy Kumar *v.* Maharajah Bejoy Chand, 29 Cal., 813: 6 C. W. N., ccxlix.

Whether the right is exerciseable by one of several joint purchasers :—The right given to the auction-purchaser of an entire estate in the permanently-

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settled districts of Bengal, Behar and Orissa, sold for arrears of revenue under s. 37 of Act XI of 1859 to avoid and annul an under-tenure, is a right that must be exercised by all the purchasers jointly where there are more purchasers than one.—Jatra Mohun *v.* Aukhil Chundra, I. L. R., 24 Cal., 334.

Power to direct that occupancy-holdings be dealt with under foregoing sections as tenures.

168. (1) The Local Government may from time to time, by notification in the official Gazette, direct that occupancy-holdings or any specified class of occupancy-holdings in any local area put up for sale in execution of decrees for rent due on them shall, before being put up with power to avoid all incumbrances, be put up subject to registered and notified incumbrances, and may by like notification rescind any such direction.

(2) While any such direction remains in force in respect of any local area, all occupancy-holdings, or as the case may be, occupancy-holdings of the specified class in that local area, shall, for the purposes of sale under the foregoing sections of this chapter, be treated in all respects as if they were tenures.

Object of this section:—The object of this section is explained in the Statement of Objects and Reasons for the Bill, in which it was said that it was thought that the provisions of this Chapter were as a general rule unsuited to occupancy holdings, "inasmuch as an ordinary occupancy holding is not likely to be saddled with incumbrances which should be respected at a sale. It appears, however, that there are in some parts of the country occupancy-holdings of large extent, the land of which is sub-let on such terms that the interest of the lessee is of considerable value. Under these circumstances, the proper course appears to be that occupancy holdings should as a rule be sold at once with power to annul all incumbrances (sec. 166); but that the Local Government should have power to direct that the occupancy holdings in any local area should be in the first instance put up subject to incumbrances, as if they were tenures." (Selections from papers relating to the Bengal Tenancy Act 1885 p. 206.). The Local Government has not as yet found it necessary to take action under this section.

Rules for disposal of the sale-proceeds.

XIV of 1882.

169. (1) In dispoing of the proceeds of a sale under this chapter, the following rules, instead of those prescribed by section 295 of the Code of Civil Procedure, shall be observed, that is to say:—

(*a*) there shall first be paid to the decree-holder the costs incurred by him in bringing the tenure or holding to sale;

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(*b*) there shall, in the next place, be paid to the decree-holder the amount due to him under the decree in execution of which the sale was made;

(*c*) if there remains a balance after these sums have been paid, there shall be paid to the decree-holder therefrom any rent which may have fallen due to him in respect of the tenure or holding between the institution of the suit and the date of the sale;

(*d*) the balance (if any) remaining after the payment of the rent mentioned in clause (*c*) shall, upon the expiration of two months from the confirmation of the sale, be paid to the judgment-debtor upon his application.

(2) If the judgment-debtor disputes the decree-holder's right to receive any sum on account of rent under clause (*c*), the Court shall determine the dispute, and the determination shall have the force of a decree.

This section makes a considerable modification in the rule laid down in s. 295 of the Civil Procedure Code.

Clause (c):—The date of sale means the date of confirmation of sale.—Matangini Chowdhurani *v.* Sree Nath Das: 7 C. W. N. 552. The landlord is therefore entitled to deduct from the sale-proceeds the rent for the period up to the confirmation of sale. Maclean, C. J., in delivering judgment said as follows:—Looking to the object of the section it would, I think, be narrow construction to say the date of sale means the actual date of sale, as opposed to the date when it becomes absolute. Having regard to ss. 314 and 316 of the Code of Civil Procedure I think it means the date when the sale becomes absolute: and that the construction may fairly be based upon it without straining the language of the section: otherwise the landlord might be driven to bring a separate suit for the rent of the intermediate period." Date of sale.

This provision of the law evidently shews that the Legislature intended that the charge in respect of any rent falling due between the date of suit and the date of sale in satisfaction of the decree passed therein, shall be transferred from the tenure to his sale-proceeds, and that the tenure shall pass to the purchaser at a sale for arrears of rent free of all liability created upon it by the default of the previous holder." (*Per* Macpherson and Banerjee, JJ.)—Faez Kahaman *v.* Ramsukh Bajpai, 21 Cal., 169 (at p. 171). A purchaser at sale for arrears of rent is not therefore liable for any rent accruing due before the date of his purchase.—*Ibid.* Subsequent rent a charge.

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Clause (d):—Where in execution of a decree for rent obtained against a recorded tenant a tenure was sold, and an unregistered tenant (a purchaser of a share of the tenure after the date of the decree) brought a suit for recovery of the surplus sale-proceeds, *held* that such a suit was maintainable.—Matangini Chowdhurani *v.* Sree Nath Das: 7 C. W. N. 552. A suit for a share of the proceeds of the sale of a tenure sold in execution of a decree for arrears of rent is not cognizable by a Small Cause Court.—(Ram Kumar *v.* Ram Kamal, I. L, R. 10 Cal., 388.)

Recorded tenant.

Not cognizable by Small Cause Court.

170. (1) Sections 278 to 283 (both inclusive) of the Code of Civil Procedure shall not apply to a tenure or holding attached in execution of a decree for arrears due thereon.

Tenure or holding to be released from attachment only on payment into Court of amount of decree with costs, or confession of satisfaction by decree-holder.

(2) When an order for the sale of a tenure or holding in execution of such a decree has been made, the tenure or holding shall not be released from attachment unless, before it is knocked down to the auction-purchaser, the amount of the decree, including the costs decreed, together with the costs incurred in order to the sale, is paid into Court, or the decree-holder makes an application for the release of the tenure or holding on the ground that the decree has been satisfied out of Court.

(3) The judgment-debtor or any person having in the tenure or holding any interest voidable on the sale may pay money into Court under this section.

Sub-section (1):—No claim, therefore, can be preferred under section 278 of Code of Civil Procedure to a tenure or holding so attached, "whether the claim is to the tenure or adverse to the tenure," *viz.*, whether the claim is as regards the tenure itself or is based upon the allegation that the property attached and in respect of which the claim is made does not form part of the tenure.—Makbul Ahmed v. Rakhal Das Hazra 4 C. W. N., 732; Amrito Lal Bose *v.* Nemai Chand Mukhopadhya 5 C. W. N., 474, F. B., overruling Jagabundhu Chattopadhya *v.* Deenu Pal 4 C. W. N., 734. This sub-section applies to tenures or holdings attached, after the present Act came into operation, in execution of decrees obtained before that date:—Deb Narain Dutt *v.* Narendra Krisna, I. L. R., 16 Cal., 267, F. B.

Attachment in execution of decree obtained by fractional co-sharer:—An attachment of a tenure or holding in execution of a decree obtained by a fractional co-sharer for arrears of rent of his separate share is not such an attachment as is contemplated by section 170 of the Bengal Tenancy Act, and does not exclude the operation of the claim sections of the Code.,—Beni Madhab Ray *v.* Jaod Ali Sircar

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I. L. R., 17 Cal., 390. But when a decree for the entire rent has been obtained by one of serveral co-sharers, by making the other parties defendants and is executed by him alone, and the defaulting tenure attached, no claim by a third person under section 278 of C. P. C., to the attached property is maintainable by virtue of sec. 170 of the Bengal Tenancy Act :—Chandra Sekhar *v.* Ranee Mghia, 3 C. W. N., 386; the decree has in this case the same effect as if the decree has been obtained by all the co-sharers and sec. 188 has no application to a case like the present.—*Ibid.*

Amount paid into Court to prevent sale to be in certain cases a mortgage-debt on the tenure or holding.

171. (1) When any person having, in a tenure or holding advertised for sale under this chapter, an interest which would be voidable upon the sale, pays into Court the amount requisite to prevent the sale,—

(*a*) the amount so paid by him shall be deemed to be a debt bearing interest at twelve per centum per annum and secured by a mortgage of the tenure or holding to him;

(*b*) his mortgage shall take priority of every other charge on the tenure or holding other than a charge for arrear of rent; and

(*c*) he shall be entitled to possession of the tenure or holding as mortgagee of the tenant, and to retain possession of it as such until the debt, with the interest due thereon, has been discharged.

(2) Nothing in this section shall affect any other remedy to which any such person would be entitled.

The principle enunciated in this section seems to have been borrowed from cl. (4), s. 13, Reg. VIII of 1819, s. 6, Act VIII B. C. of 1865, and s. 62, Act VIII B. C. of 1869.

Having an interest:—Where an under-tenure has been transferred, the transferee would be entitled to protect the tenure from sale, although his transfer had not been registered in the *serishta* of the landlord or the superior-tenure-holding.—Ananda Lal *v.* Kalika Pershad, 20 W. R., 59; Rajendra Narain *v.* Phudi Mandal, I. L. R., 15 Cal., 482.

Clause (a):—A mortgage created by the operation of s. 171 is not an incumbrance within the meaning of this chapter and as such, not liable to be avoided by the purchaser of a tenure at a sale in execution of a decree for arrears of rent:—Pasupati Mahapatra *v.* Narayan Dasi, 1 C. W. N. 519: I. L. R., 24 Cal., 537. The security extends over the whole tenure in respect of which the payment is made, and is not appor-

Effect of mortgage.

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tioned according to the interests of the tenure-holders if there are several.—S. A. no. 47 of 1889, decided by Petheram C. J. and Banerji, J., 1st May 1890. A co-sharer tenant paying in the whole amount of the decree for which he is liable along with the other defendants does not acquire a charge over the shares of his defaulting co-tenants.

Payment by co-sharer.

Clause (c):—Under cl. 4, sec. 13 of Reg. VIII of 1819 a person making deposit to stay the sale of a superior tenure was entitled to be put in possession of the tenure of the defaulter "on applying for the same." Probably the same produce was contemplated by the Legislature. The person put in possession of the tenure or holding must pay the rent due to the superior landlord.—Kanye Lall *v.* Nistarini, I. L. R., 10 Cal., 443. The defaulter is not liable for the rent whilst the *quasi*-mortgagee is in possession.—Bhyrub *v.* Lailt, I. L. R., 12 Cal., 185. A person who enters into possession of a tenure as mortgagee under the provision of Regulation VIII of 1819 cannot appropriate the whole of the collections to the satisfaction of his own claim. He is bound in the first place to pay the rent due to the landlord.—*Ibid.*

Liability to rent.

Sub-section (2): Other remedies:—(1) By a regalar suit (Lukhi Narain Mitter *v.* Khetra Pal Singh Ray 13 B. L. R., 146 (P. C.), overruling Ananda Chandra *v.* Soobul Chunder, S. D. A. (1857), 159, Lakhi Narain *v.* Seetanath 6 W. R., X, 8; Umbika Debia *v.* Pran Huree Doss, 4 B. L. R., F. B., 77; 13 W. R., F. B., 1.) or (2) by deduction from the rent payable (s. 172 *post*). But in order to entitle the depositor to maintain a suit for the recovery of the amount there must be some privity between him and the defaulter. Where a mortgagee who had purchased the mortgaged property in execution of his own decree on the property being again put up to sale in execution of a decree for arrears of the rent due prior to the date of his purchase paid the amount and stayed the sale and then brought a suit to recover the amount of his payment, it was held that he could not recover, for there was no privity between him and the judgment-debtors under the decree for arrears of rent.—Srimati Moharanee Dasya *v.* Harendra Lal Roy Chowdhry, 1 C. W. N., 458. See also the remarks of Petheram, C. J., in Lalit Mohan Saha *v.* Srinibas Sen, I. L. R., 13 Cal., 331.

172. When a tenure or holding is advertised for sale under this chapter in execution of a decree against a superior tenant defaulting, and an inferior tenant, whose interest would be voidable upon the sale pays money into Court in order to prevent the sale, he may, in addition to any other remedy provided for him by law, deduct the whole or any portion of the amount so paid from any rent payable by him to his immediate landlord; and that landlord, if he is not the defaulter, may in like manner deduct the amount so deducted from any rent pay-

Inferior tenant paying into Court may deduct from rent.

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able by him to his immediate landlord, and so on until the defaulter is reached.

In a suit by the purchaser of a patni against a durpatnidar for arrears of the year 1285 (1878), it appeared that before the plaintiff's purchase the durpatnidar had paid the amount of arrears of patni rent for the year 1284 (1877), in order to save the patni from being sold under Reg. VIII of 1819, and that the amount so paid considerably exceeded the durpatni rent due at the date of suit, it was held that the defendant was entitled to deduct from the rent claimed the amount paid under the Regulation in excess of the durpatni rent due up to the end of 1284.—Nobogopal *v.* Srinath, I. L. R., 8 Cal., 877; 11 C. L. R., 37; Lalit Mohun *v.* Srinibash, I. L. R., 13 Cal., 331.. The direction in section 13 of Reg. VIII of 1819, that money paid into Court by a talukdar in order to stay the final sale shall be deducted from any claim of rent that may at the time be pending on account of the year or months for which the notice of sale may have been published, is satisfied by payment not into Court, or to the zemindar. If a strictly literal construction were put upon the words "into Court," no payment effectual to stay the sale could be made, for "the Court" has nothing to do with these sales, which are managed by the Collector—Tarinee Debee *v.* Shamachurn, I. L. R., 8 Cal., 954.

Decree-holder may bid at sale; judgment-debtor may not.

173. (*1*) Notwithstanding anything contained in section 294 of the Code of Civil Procedure, the holder of a decree in execution of which a tenure or holding is sold under this chapter may, without the permission of the Court, bid for or purchase the tenure or holding.

(*2*) The judgment-debtor shall not bid for or purchase a tenure or holding so sold.

(*3*) When a judgment-debtor purchases by himself or through another person a tenure or holding so sold, the Court may, if it thinks fit, on the application of the decree-holder or any other person interested in the sale, by order set aside the sale and the costs of the application and order, and any deficiency of price which may happen on the re-sale, and all expenses attending it, shall be paid by the judgment-debtor.

Sub-section (1):—Section 294 of the Code of Civil Procedure declares that "No holder of a decree in execution of which property is sold shall, without the express permission of the Court, bid for or purchase the property." This rule will not apply to a holder of a rent decree.

Sub-section (2):—See s. 186, I. P. Code.

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Sub-section (3) : Setting aside a sale :—The Court holding the sale is the proper Court to determine whether the sale should stand or not.—Gopal Chunder v. Ram Lall, I. L. R., 21 Cal., 554. If it determines the question in the negative, it has to put up the property again to sale ; a Court, other than the execution Court, is not in a position to do so.—*Ibid.* Where in a execution of a decree for arrears of rent against the recorded tenant (who had no existing interest in the tenure and whose interest had been sold previously in execution of a money decree) the tenure was sold and purchased by the recorded tenant in the benami of another person, *held* that the sale ought not to be set aside on the ground of the purchase being made by the judgment-debtor.—*Ibid.* The sale is only voidable and not void.—*Ibid.* If the question is between the parties to the suit in which the decree is made a separate suit does no lie to have the sale set aside.—*Ibid.* But a person not a party to the suit may bring a separate suit to have the sale set aside.—*Ibid.* It has been held that an attachment-creditor is interested in the sale, and has therefore a *locus standi* to apply to set aside a purchase by the judgment-debtor.—Eastern mortgage and Agency Company, Ld. *v.* Gobind Ch. Chatterji, 3 C. W. N., xiv. Where the landlord of an occupancy holding obtains a decree for rent against his registered tenant, an unregistered transferee of the tenant, into whose hands a portion of the holding has previously passed is bound by the decree. *Held* that such a transferee can apply under this section to set aside the sale on the ground that the holding has been purchased by the judgment-debtor in the name of the auction-purchaser. Ishan Ch. Sarkar v. Beni Madhub Sarkar, I. L. R., 24 Cal., followed :—Azgar Ali v. Asaboddin Kazi, 9 C. W. N., 134. Such a transferee is a representative of the judgment-debtor within s. 244 C. P. C., Kalu Saha *v.* Bhagabati Debya, 6 C. W. N., 127 ; Sarala Dassee v. Saroda Prosad Bose, Mis. App. 398 of 1903 (unreported) distinguished.—*Ibid.* He can also apply to set aside a sale as a person whose immoveable property has been sold within the meaning of s. 311 C. P. C.—*Ibid.* The decree-holder and all the judgment-debtors are necessary parties to proceedings under section 173 of the Bengal Tenancy Act.—Mohima Chandra . *v* Jotendra Kumar, 3 C. W. N., xiv.

Proper Court.

Sale voidable but not void.

Appeal :—No appeal lies from an order setting aside a sale under section 173 of the Bengal Tenancy Act.—Roghu Singh *v.* Misri Singh, I. L. R., 21 Cal., 825. This view was considered in a later case, and the pronouncement was held to be applicable only to appeals by auction-purchasers.—Harabandhu *v.* Harish Chunder, 3 C. W. N., 184. The Court being of opinion that, although no appeal could be preferred by the auction-purchaser from an oder setting a sale aside under section 173, an appeal might lie on behalf of the decree-holder or a co-judgment-debtor.—Mohima Chandra Neogy *v.* Jogendro Kumar Ghosh, 3 C. W. N., civ, *supra.* An appeal will lie on behalf of the judgment-debtor.—Sriram Chunder Singh *v.* Guru Dass Kundu, 3 C. W. N., civ ; Chand Monee Dasya *v.* Santo Monee Dosya, I. L. R., 24 Cal., 707 ; 1 Cal., W. N., 534 ; Mohima Chnnder Newgy *v.* Jogendro Coomar Ghosh 13 C. W. N., xiv ; see also Harabandhu Adhikari *v.* Harish Chunder Dey 3 Cal , W. N., 184 Sriram *v.* Gurudas Das, *supra.* Where

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the appellant's case is that the purchase was made, not by a third party but by some of the judgment-debtors *benami* in the name of the auction-purchaser, the case if proved, would come under section 244 of the Code of Civil Procedure, and *á fortiori* an appeal would lie.

Second appeal:—Where the auction-purchaser is a benamidar for the judgment-debtor, a second appeal lies to the High Court from the order made on an application to set aside a sale under section 173 of the Bengal Tenancy Act and section 311 of the Code of Civil Procedure, as the appilcation is one under section 244 of the Code of Civil Procedure.—Chand Monee *v.* Santo Monee, I. L. R., 24 Cal., 707; 1 C. W. N., 534.

Limitation:—An application under this section is governed by art. 178 of Sched. 11 of the Limitation Act.—Chand Moni *v.* Santo Moni, 1 C. W. N., 534: I. L. R., 24 Cal., 707.

174. (1) Where a tenure or holding is sold for an arrear of rent due thereon, then, at any time within thirty days from the date of sale, the judgment-debtor may apply to have the sale set aside, on his depositing in Court for payment to the decree-holder, the amount recoverable under the decree with costs, and for payment to the purchaser, a sum equal to five per centun of the purchase-money.

Application by judgment-debtor to set aside sale.

(2) If such deposit is made within the thirty days, the Court shall pass an order setting aside the sale, and the provision of section 315 of the Code of Civil Procedure shall apply in the case of a sale so set aside.

XIV of 1882.

Provided that, if a judgment-debtor applies under section 311 of the Code of Civil Procedure to set aside the sale of his tenure or holding, he shall not be entitled to make an application under this section.

XIV of 1882.

(3) Section 313 of the Code of Civil Procedure shall not apply to any sale under this chapter.

XIV of 1882.

Proceedings in execution of decree passed before this Act came into force:—No suit is maintainable to set aside a sale under the provision of s. 174 of the Bengal Tenancy Act. The right under the section to have a sale set aside is not an abstract right which can be enforced by suit against any particular person but is a right to call upon a Judge to set aside a sale, and on his refusal, to proceed in revision.—Kabilaso Koer v. Raghu Nath Sakan Singh, I. L. R., 18 Cal., 181. Section 874

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does not create a new right in a judgment-debtor, and therefore it is applicable to proceedings in execution of a decree which had been passed before the present Act became law.—Jagadananda Sing *v.* Amrita Lal Sirkar, I. L. R., 22 Cal., 767, F. B. *Held* further that provisions of section 310A of the Code of Civil Procedure were applicable to proceedings under section 174 of the Bengal Tenancy Act.—*Ibid*. It was also held by the Full Court that the decision in Lal Mohun Mookerjee *v.* Jogendra Chunder Roy, I. L. R., 14 Cal., 636, so far as it holds that s. 174 of the Bengal Tenancy Act creates a new right in a judgment-debtor, and is therefore inapplicable to a case in which the decree was passed before that Act became law, is wrong. The cases of Uzir Ali *v.* Ram Komal Shaha, I. L. R., 15 Cal., 383, and Girish Chundra Basu *v.* Apurba Krishna Dass, I.L.R., 21 Cal., 940, which are based upon the same principle, were also wrongly decided. *Quære*—Whether the decision in Lal Mohun Mookerjee *v.* Jogendra Chunder Roy, I. L. R., 14 Cal., 636, was correct under s. 6 of the General Clauses Act by reason of the execution-proceedings having been commenced under Bengal Act VIII of 1869, an Act repealed by the Bengal Tenancy Act?

Sub-section. Who may apply to have the sale set aside:—The word "judgment-debtor" as used in s. 174 of Act VIII of 1885 does not include a transferee or assignee from a judgment-debtor, but must be construed strictly as referring to a judgment-debtor alone.—Rajendra Narayan Ray *v.* Phudy Mondal, I. L. R., 15 Cal., 482. But this decision has become inoperative by the decisions in Jagadananda Sing *v.* Amritalal Sirkar, I. L. R,, 22 Cal.. 767, F. B.: Janardan Ganguli *v.* Kali Krishna Jhaku, I. L. R,, 23 Cal., 395, and in Banshidar Haldar v. Kedar Nath Mundle, 1 C. W. N., 114, which have held that the provisions of sec. 310A of the Code of Civil Procedure are applicable to sales held in execution of rent decrees. The provisions of section 310A are new and were added to the Code of Civil Procedure by Act V of 1894. They provided that "any person whose immoveable property has been sold in execution of a decree to apply to have the sale set aside on his depositing within 30 days of the sale the decretal amount and 5 p. c. of the purchase money." The terms of sec. 310A are therefore, much wider than those of sec. 174, and consequently practically supersede them. A person whose tenure or holding has been sold in execution of a decree obtained by a co-sharer landlord for his separate share of the rent is clearly entitled to apply for relief under section 310A of the Code, although he may not be able to do so under section 174 of the present Act, which has been supposed to apply to a sale under a decree obtained by the sole landlord or the general body of the landlords. A mortgagee, whether by a simple mortgage or a motrgage by conditional sale, of a tenure or holding sold in execution of a decree for arrears of rent due in respect of it, is a "person whose immoveable property has been sold" within the meaning of s. 310A, C. P. C., and is entitled to make an application under that section:—Paresh Nath *v.* Nobogopal, 5 C. W. N., 821 (F. B.): I. L. R., 29 Cal., 1. The

Judgment-debtor.

S. 310A C. P. C.

A judgment-debtor whose tenure is sold by a co-sharer landlord.

Mortgagee.

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case of Nitya Nanda *v.* Hira Lal, 5 C. W. N., 63, was overruled by the Full Bench, and the case of Hamidul *v.* Matangini, 2 C. W. N., cclviii, was approved. A mortgagee may apply under s. 310A, C. P. C.—Srinivasa *v.* Ayyathorai, I. L. R., 21 Mad. 416; Rakhal Chandra *v.* Dwarka Nath, I.L.R., 13 Cal., 346; Asmatunnissa *v.* Ashruff Ali, I. L. R., 15 Cal., 488 (491, 492). Whether a mortgagee can apply under s. 310A, C. P. C., depends upon the nature, not of the mortgage but of the execution sale; the mortgagee is entitled to apply if the sale is free from the mortgage, but not if it is subject to the mortgage :—*Per* BANERJEE, J., in Paresh Nath *v.* Nobogopal, 5 C. W. N., 821 (F. B.): 29 Cal., 1.

Person having interest.

The words "any person whose immoveable property is sold" in s. 310A, C. P. C., include every person who has an interest in the property in question, whether qualified, partial or absolute :—(*Per* AMEER ALI, J.) Paresh Nath *v.* Nobogopal, 5 C. W. N., 821 (F. B.), 29 Cal., 1, overruling Nityananda Patra *v.* Hitalal Karmokar, 5 C. W. N., 63. Where an application to have a sale set aside under s. 310A, C. P. C., is made by a person who had acquired an interest in the property sold, before the judgment-debtor became liable under the decree, *held* that the applicant was a person whose immoveable property had been sold within the meaning of s. 310A, C. P. C., that he was a co-sharer and his interest was not an encumbrance or a protected interest which would be affected by the sale.—Bangsheedhur *v.* Kedar Nath, 1 C. W. N., 114. A person who claims to be a purchaser of a tenure prior to its attachment in execution of a decree for its own arrears of rent is entitled to apply under section 311 of the Code of Civil Procedure to have the sale set aside.—Aubhoy Dassi *v.* Pudmo Lochan, I. L. R., 22 Cal., 802. But a purchaser at a private sale from the judgment-debtor after sale in execution has no *locus standi*,—Hazari Ram *v.* Badar Ram, 1 C. W. N., 279. So a person who was not the judgment-debtor but a purchaser of the property long before the date of a suit against a third person is not entitled to come in under s. 310A when the property is sold in execution of a decree against the latter.—Ram Chandra *v.* Rakhmabai, I. L. R., 23 Bom., 450. A purchaser from a judgment-debtor prior to attachment is not entitled to come in under s. 311, C. P. C. :—Asmatunnissa *v.* Asruff, I. L. R., 15 Cal., 488 (F. B.), overruling Abdul Huq *v.* Mohini Mohun, I. L. R., 14 Cal., 240. A benamidar of a person whose immoveable property is sold has a right to apply to have the sale set aside under s. 310A, C.P.C. :—Basi Paddar *v.* Ram Krishna, 1 C. W. N., 135; Paresh Nath *v.* Nobo Gopal, *supra*. A person claiming to be the beneficial owner of property which has been sold as the property of the ostensible owner can apply to have the sale set aside under s. 311, C. P. C.—Abdul Guni *v.* Dunnee, I. L. R., 20 Cal., 418; see also Asmatunnissa *v.* Ashruff, I. L. R., 15 Cal., 488. The same rule will apply to applications under s. 310A, C. P. C. The purchaser of a share of an occcupancy-holding which is transferable by custom can apply under section 310A of the Code, as being a person whose immoveable property has been sold in execution of a decree for arrears of rent due in respect of the holding.

Purchaser before suit.

Benamidar.

Beneficial owner.

Purchaser of an occupancy holding.

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An attaching creditor is not "a person whose immoveable property is sold" within the meaning of s. 310A, C. P. C. and he is not entitled to make an application to set aside the sale under that section—Kedar Nath *v.* Umacharan, 6 C. W. N., 57. The words "person whose immoveable property has been sold" are identical in sections 310A and 311, C. P. C., so the decision in the case of Matungini *v.* Monmotha, 4 C. W. N., 542, to the effect that an attaching creditor is not a person whose immoveable property is sold under s. 311 was held to be an authority in support of the decision in the case of Kedar Nath *v.* Umacharan, 6 C. W. N., 57. Where a tenure is sold free from all encumbrances a person holding a *howla* under the tenure which *howla* was an encumbrance and could be annulled by the auction-purchaser, was held not to be entitled to apply under s. 310A, C. P. C.—Administrator-General of Bengal *v.* Mahomed Khalil, 5 C. W. N., cxxxii; see, however, Paresh Nath Sing *v.* Nobo Gopal, 5 C. W. N., 84, F. B. This decision was not followed in Narain Mundle *v.* Sourendra Mohan Tagore I. L. R., 32 Cal., 107, which held that when a mokarari tenure is sold in execution of a decree for arrears of rent, a durmokararidar has a right to come in and make a deposit under s. 310A of the Civil Procedure Code, being a person whose immoveable property has been sold within the meaning of that section. Paresh Nath Sing *v.* Nobogopal Chattopadhya, I. L. R., 29 Cal.; Benodini Dassee *v.* Peary Mohan Haldar, 8 C. W. N., 55; Kunja Behari Mandal *v.* Sambhu Charan Roy, 8 C. W. N., 232. Janardan Ganguli *v.* Kali Kristo Tagore, I. L. R., 23 Cal., 393; Abad Mollah *v.* Diljan Mollah, I. L. R. 29 Cal., 459; were referred to.—Narain Mandal *v.* Sourindra Mohan Tagore, I. L. R., 32 Cal., 107. An under-raiyat cannot apply to set aside the sale of a raiyat's holding sold in execution of a decree for arrears.—Abad *v.* Diljun, I. L. R., 29 Cal., 459. A person who has contracted to purchase land cannot come in under s. 310A, C. P. C., to have the sale of such set aside:—Mahadee *v.* Vasudeo, I. L. R., 23 Bom., 181. A person whose interest is not sold and cannot have passed under the sale is not entitled to apply under the s. 310A, C. P. C.—Mallikar Janudu *v.* Lingamurti, I. L. R., 12 Mad., L. J. 279.

Attaching creditor has no *locus standi*.

Not an under-tenant.

Not an under-raiyat.

Person who contracts to purchase land.

Person whose interest does not pass by sale.

Sub-section (2). Conditions of deposit:—Five per cent of the purchase-money is to be deposited even where decree-holder is the purchaser.—Tirmul Rao *v.* Syed Dastaghiri, I. L. R., 22 Mad., 286; Chandi Churn *v.* Bunku Behari, 3 C. W. N., 283: I. L. R., 26 Cal., 449 (F. B.) The judgment-debtor must deposit in Court the whole of the debt, the expenses and the damages which the purchaser has sustained.—Kabilaso Koer *v.* Raghu Nath, I. L. R., 18 Cal., 411. The amount deposited must primarily be the amount of the decree of which execution is sought. But if, before the sale is actually held, the decree of the Court of first instance is modified in appeal in favour of the judgment-debtor, then, necessarily the amount must be

Amount of deposit.

Meaning of "decree."

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the amount recoverable under the decree of the Appellate Court.—Bhiku Sing *v.* Bhanu Mahton, 3 C. W. N., 23. The words "less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder" contemplate an actual receipt of the amount by the decree-holder; so where two properties were sold and the judgment-debtor prayed to have the sale of one of the properties set aside and asked the Court to deduct from the decretal amount the sale-proceeds of the other property, *held* that the judgment-debtor was not entitled to have the sale set aside—Trimbak *v.* Ram Chandra, I. L. R., 23 Bom., 723.

Where the judgment-debtor deposited a sum of money in cash and also a Government Promissory note for Rs. 1,000, which, if negotiated, would probably be more than sufficient to cover the balance due, *held* that in order to claim the benefit of s. 174 the judgment-debtor is bound strictly to comply with its provisions, and that the deposit made should be of such a nature as to be at once payable to the parties and that therefore upon such a deposit the sale ought not be set aside.—Rohim Bar *v.* Nanda Lal, I. L. R., 14 Cal., 321. A deposit under s. 174 must be such as the decree-holder may draw out at once: a deposit not made payable to the decree-holder until a certain event had happened is not a good deposit within the meaning of that section:—Shakoti *v.* Jotindra Mohan, 1 C. W. N., 132. Where the thirtieth day falls on a holiday the deposit may be made on the first day the Court reopens:—Sashie Bhusan *v.* Govinda Chunder, I. L. R., 18 Cal., 231. The broad principle laid down in Waterton *v.* Baker, L. R. 3 Q. B. 173, is that although the parties themselves cannot extend the time for doing an act in Court, yet if the delay is caused not by any act of their own but by some act of the Court or higher authority, it is excusable—See s. 10 of Act X of 1897. If the amount payable has been calculated and settled by an officer of the Court and that amount has been paid into Court, an order setting aside the sale must be made as a matter of right even though the amount is short by a small sum.—Ugrah Lal *v.* Radha Prasad Singh, I. L. R., 18 Cal., 258, followed in Abdul Latif *v.* Jadab Chandra Mitra, I. L. R., 25 Cal., 216. The same rule applies to amounts deposited under the provision of sec. 310A, C. P. C. Makbul Ahmed Chaudhri *v.* Bazal Sobhan Chaudhri, I. L. R., 25 Cal., 609. But see Chandi Charan Mandal *v.* Banka Behari Lal, I. L. R., 26 Cal., 459, F. B.

Deposit must be payable at once.

Deposit within 30 days.

Mistake in calculation.

Sale in execution of decree for road-cess:—The provisions of sec. 174 are applicable to a sale held in execution of decree for road-cess.—Kishori Mohan Rai v. Sarodamoni Dasi, 1 C. W. N., 30.

Amount deposited cannot be rateably distributed:—Sec. 295, C. P. C., which provides for the rateable distribution of assets realised by sale or otherwise does not apply to a deposit made by a judgment-debtor either under sec. 174 of the Tenancy Act or under sec. 310A, C. P. C.—Bihari Lal Pal *v.* Gopal Lal Sil, 1 C. W. N., 695; Hari Sunderi *v.* Shashi Bala, 1 C. W. N,, 195; Roshun Lal *v.* Ram Lal, 7 C. W. N., 341.

Notice to purchaser:—An auction-purchaser is entitled to a notice before an

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order under sec. 310A for setting aside a sale is made.—Janardan Ganguli *v.* Kali Krishna Thakur, I. L. R., 23, Cal., 396; Banshidhar Haldar *v.* Kedar Nath Mandal, 1 C. W. N., 114. But see Bhairab Pal *v.* Prem Chand Ghosh, 1 C. W. N., clxi.

Appeal :—An order under sec. 174 is not appealable, as it is not one under sec. 244, C. P. C.—Kishori Mohan Rai *v.* Saroda Mani Dasi, 1 C. W. N., 30; Subhnarain *v.* Rajkamar 2 C. W. N., ccxliii; and not being a proceeding for the execution of a decree.—Subh Narain Lal *v.* Gorak Prasad, 3 C. W. N., 344. A proceeding under s. 174 of the Bengal Tenancy Act is not a proceeding for the execution of a decree; it may be a proceeding relating to the execution of a decree but it does not come within the explanation to s. 647, C. P. C., as being an application for the execution of a decree.—*Ibid.* Neither is an order under sec. 310A appealable.—Bansidhar Haldar *v.* Kedar Nath Mandal, 1 C. W. N., 114. But where the auction-purchaser is a stranger, s. 622, C. P. C., is applicable.—Kedar Nath *v.* Umacharan; see also Jagadanand *v.* Amrita Lal, I. L. R., 22 Cal., 767; Bungshidhur *v.* Kedar Nath, 1 C. W. N., 114. Wheher an order under s. 310A is subject to appeal or to revision under s. 622, C. P. C., depends upon the circumstances of each particular case. Where the purchaser is the decree-holder himself and the question arises between him and the judgment-debtor, an appeal lies.—Kedar Nath *v.* Umacharan, 6 C. W. N., 57; see also Chundi Charan *v.* Banki Behari, 26 Cal., 449 (F.B.), Kripanath *v.* Ram Lahshi, 1 C. W. N., 703; such an order is one under s. 244, clause (*c*), and therefore an appeal lies.—Phul Chand *v.* Nursingh, I. L. L., 28 Cal., 76. Where the lower Court sets aside a sale under s. 310A, C. P. C., in a case to which the section is not applicable, the High Court can interfere under s. 622, C. P. C., as the order is not merely an erroneous order but is made without jurisdiction :—Kedar Nath *v.* Umacharan, 6 C. W. N., 57.

Deposit no charge on property :—Where the plaintiffs and defendants were co-tenants of two *jotes*, which were sold in execution of a decree for rent, and the plaintiffs paid the decretal amount and auction purchaser's fees, and had the sale set aside, it was held that the plaintiffs had not, besides their right to contribution personally, a right to a charge on the property so far as the share of their co-tenants was concerned for the amount paid by them—Gopi Nath *v.* Ishan Chunder, I. L. R., 22 Cal., 860; see also Kina Ram *v.* Muzaffar Hussen, I. L. R., 14 Cal., 809.

Order under s. 315 C. P. C :—When a deposit has been made in accordance with the law, and an order has been passed setting aside the sale, the law requires that there should be a further order under section 315 of the Code of Civil Procedure, directing the return of the purchase-money to the purchaser. This order under section 315 of the Code may be enforced as a decree for money.

Subsection (2). Proviso :—Section 311 of the Code of Civil Procedure says that an application can be made for setting aside a sale on the ground of material irregularity in publishing and conducting it, by the decree-holder or any person whose immoveable property has been sold, provided the applicant proves that he has sustained substantial injury by reason of the irregularity, and this has been held to apply also to sales taking place in execution of rent decrees.—Azizunnissa Khatun *v.* Gora Chand Das, I. L. R., 7 Cal., 163. In Rajendra Nath Haldar *v.* Nilratan Mitter, I. L. R., 23

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Cal., 958, it was held that when a person had applied under section 310A of the Code he was precluded from proceeding under section 311.

Sub-section (3):—As rent of a tenure or holding is the first charge thereon, no application can be made under s. 313 of C. P. Code to set aside a sale on the ground that the person against whom execution had been taken out had no saleable interest in the tenure or holding. It cannot be followed in the hands of a stranger. This sub-section does not debar a person from asking relief under s. 335 C. P. Code.

Registration of certain instruments creating incumbrances.

175. Notwithstanding anything contained in Part IV of the Indian Registration Act 1877, an instrument creating an incumbrance upon any tenure or holding, which has been executed before the commencement of this Act, and is not required by section 17 of the said Registration Act to be registered, shall be accepted for registration under that Act if it is presented for that purpose to the proper officer within one year from the commencement of this Act.

Notification of incumbrances to landlord.

176. Every officer who has, whether before or after the passing of this Act, registered an instrument executed by a tenant of a tenure or holding and creating an incumbrance on the tenure or holding, shall, at the request of the tenant or of the person in whose favour the incumbrance is created, and on payment by him of such fee as the Local Government may fix in this behalf, notify the incumbrance to the landlord by causing a copy of the instrument to be served on him in the prescribed manner.

Rules:—For rules by the Local Government as to the fees payable for the notifying of incumbrances to the landlord, see rules 1 to 4 in Chapter VII of the Government Rules in the Appendix. The manner in which notices of incumbrances should be served is regulated by rule 3 of chapter 1 of the said rules. The manner in which applications for notifying incumbrances to the landlord should be made and dealt with is prescribed by rules 27 to 31 framed by the Registration Department under the present Act in Appendix VI.

Power to create incumbrances not extended.

177. Nothing contained in this Chapter shall be deemed to enable a person to create an incumbrance which he could not otherwise lawfully create.

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CHAPTER XV.

CONTRACT AND CUSTOM.

Restrictions on exclusion of Act by agreement.

178. (1) Nothing in any contract between a landlord and a tenant made before or after the passing of this Act—

(*a*) shall bar in perpetuity the acquisition of an occupancy-right in land, or

(*b*) shall take away an occupancy-right in existence at the date of the contract, or

(*c*) shall entitle a landlord to eject a tenant otherwise than in accordance with the provisions of this Act, or

(*d*) shall take away or limit the right of a tenant as provided by the Act, to make improvements and claim compensation for them.

(2) Nothing in any contract made between a landlord and a tenant since the 15th day of July, 1880, and before the passing of this Act, shall prevent a raiyat from acquiring in accordance with this Act an occupancy-right in land.

(3) Nothing in any contract made between a landlord and a tenant after the passing of this Act shall—

(*a*) prevent a raiyat from acquiring in accordance with this Act an occupancy-right in land;

(*b*) take away or limit the right of an occupancy-raiyat to use land as provided by section 23;

(*c*) take away the right of a raiyat to surrender his holding in accordance with section 86;

(*d*) take away the right of a raiyat to transfer or bequeath his holding in accordance with local usage;

(*e*) take away the right of an occupancy-raiyat to sub-let subject to, and in accordance with, the provisions of this Act;

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(*f*) take away the right of a raiyat to apply for a reduction of rent under section 38 or section 52;

(*g*) take away the right of a landlord or a tenant to apply for a commutation of rent under section 40; or

(*h*) affect the provisions of section 67 relating to interest payable on arrears of rent:

Provided as follows:—

(i) nothing in this section shall affect the terms or conditions of a lease granted *bona fide* for the reclamation of waste land, except that, where, on or after the expiration of the term created by the lease, the lessee would, under Chapter V, be entitled to an occupancy-right in the land comprised in the lease, nothing in the lease shall prevent him from acquiring that right;

(ii) when a landlord has reclaimed waste land by his own servants or hired labourers, and subsequently lets the same or a part thereof to a raiyat, nothing in this Act shall affect the terms of any contract whereby a raiyat is prevented from acquiring an occupancy-right in the land or part during a period of thirty years from the date on which the land or part is first let to a raiyat;

(iii) nothing in this section shall affect the terms or conditions of any contract for the temporary cultivation of orchard land with agricultural crops.

Sub-section (1). Clause (a) and (b):—This section abrogates contracts between landlord and tenant on certain points, and supercedes s. 7 of Act X of 1859 and s. 7 of Act VIII B. C., of 1869 by which raiyats could contract themselves out of the benefit of s. 6 of these Acts under which twelve years' occupation created an occupancy right.—Bengal Indigo Company *v.* Raghubur, I. L. R., 24 Cal., 272 P. C.; L. R., 23 I. A., 158; 1 C. W. N., 83. "We all know the theory on which the ordinary law of contract is based. It presupposes equality between the parties to the contract, full knowledge and appreciation by each party of the nature of the rights to which he is entitled, and a deliberate intention on either side to modify those rights in a particular manner. Gaius and Titius, or Ram Dass and Ram Bux, meet in the market-place and strike a bargain, and when they have done so, the

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Courts hold them to their bargain. But the circumstances which lead up to the execution of a kabuliyat by an occupancy-raiyat are of a very different character. The raiyat's ordinary rights, the rights with which a kabuliyat purports to deal, are not based on contract, and the whole notion of their being capable of regulation by contract is unfamiliar to him. His rights are based on occupation and regulated by custom. He did not come in under a lease by which the landlord agreed to let and the tenant agreed to take a specified piece of land, for a specified term, under specified conditions; and if any instrument purporting to be such a lease can be produced against him, it is usually a fiction. He simply occupies the land, as his forefathers have occupied it before him, subject to the observance of certain conditions, the general character of which is approximately known and understood, though they have never been reduced to a definite written form. There is a nebulous borderland between his rights and those of the zemindar, which has, from time immemorial, been the subject of dispute between them, and with respect to which the contest is under ordinary circumstances not unequally waged between persistent worry on the one side and passive resistance on the other. But there are certain central rights which we know very well that the raiyat would not give up except under the pressure of absolute necessity—rights which are essential to his status; and if we found that that he has attached his signature of mark to a kabuliyat purporting to give away these rights, we may feel morally certain that the signature has been obtained under circumstances which are described in the Indian Contract Act as constituting undue influence. In fact, whilst the elements of an ordinary legal contract are offered on the one hand, and accepted on the other, the characteristic elements of the transaction which results in the execution of such kabuliyats as these, are pressure on the one side and submission on the other. It is the execution of instruments of this nature that we wish to prevent. We desire to prevent the occupancy-raiyat from contracting or appearing to contract himself out of rights which are essential to his status. We have no desire to make this section more stringent or more comprehensive than the nature of the case requires, and if it can be shown that any of its provisions can be relaxed or modified without any serious risk of allowing the main objects of our legislation to be defeated, I should be most ready to accept the modification." —(*The Hon'ble Mr. Ilbert, Debate of Council.*) In Moheswar Pershad Narain Sing *v.* Sheoburan Mahton, I. L. R., 14 Cal., 621, the High Court seems to have considered that the provisions of clause (*b*) of sub-section (1) of section 178 of the present Act do not apply to a case where the suit to enforce a contract, by which the tenant had virtually agreed not to claim any right under section 6 of Act X of 1859, was instituted before the present Act came into force. But this case was decided before the Full Bench case of Deb Narain Datta *v.* Narendro Krisnna I. L. R., 16 Cal., 267), which held that this clause had retrospective operation.

Sub-section (1) Clause (c):—Where a tenant held a certain homestead land as part of a raiyati holding, under a lease which contained a stipulation that he would quit whenever the landlord called upon him to do so, and the landlord sued for *khas* possession under the terms of the contract, it was held that section 44, clause (*c*),

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only applies when the lease is granted for fixed term, and that under section 178, sub-section (1), clause (*c*), the stipulation in the lease could not be enforced.—Nundo Kumar Guha *v.* Sheik Kummuddi Hazi, 3 C. W. N., xlvii. The plaintiffs, purchasers of a *mokurari jama*, sued to eject the defendants, on the ground that they had in their written statement in a former suit for rent, which had been decided in the plaintiffs' favour, dened the plaintiffs' title, and had thereby forfeited their tenures. The denial took place in March 1885, before the Bengal Tenancy Act came into operation: *held*, that the forfeiture being complete before the passing of the Act, the case was not affected by s. 178 of that Act, and governed by the old law. Under the decided cases, before the Bengal Tenancy Act, such a denial by a tenant of his landlord's title created a forfeiture.—Satyabhama Dassee *v.* Krishna Chandra Chatterjee, I. L. R., 6 Cal., 55 and Ishan Chunder Chatterjee *v.* Shama Churn Dutt, I. L. R., 10 Cal., 41, referred to. But *semble*:—Since the passing of that Act, in any case to which it applies, there cannot be any eviction on the ground of forfeiture incurred by denying the title of the landlord, that not being a ground enumerated in the Act, and therefore expressly excluded by s. 178.—Debiruddi *v.* Abdul Rahim, I. L. R., 17 Cal., 196.

Forfeiture completed before passing of Act.

Sub-section (2):—The 15th July, 1880, is the date of the publication by the Government of Bengal of the Rent Law Commission's Report and Draft Bill. The date of the passing of the Act is the 14th March 1885.

Sub-section (3). Clause (d):—See notes under s. 183 *post*. It has been held that section 178 does not apply to a case where the landlord and the tenant have entered into an agreement that a transfer by the latter shall not be valid and binding until security to the satisfaction of the landlord had been furnished by the transferee, and such security has not been furnished.—Dinobandhu Roy *v.* W. C. Bonnerji, I. L. R., 19 Cal., 774. In a conveyance executed by plaintiffs in favour of defendant No. 1's father, it was provided that in case he sold the property subsequently he would be bound it give preference to the plaintiffs, *i.e.*, his vendors, to purchase the same for a certain sum; and on their refusal to accept the offer, he would be at liberty to sell the same to others; after his father's death defendant No. 1 without offering to sell the land to the plaintiffs, though they were willing to purchase it sold the same to defendants Nos. 2, 3, 4 who had notice of the contract, *held* that the contract was not binding on defendant No. 1 and therefore the sale to defendants Nos. 2, 3 and 4 was not liable to be set aside.—Nobin Chandra *v.* Nabab Ali, 5 C. W. N., 343; see also Kishen Datt *v.* Mumtaz, 6 I. A., 145. In the case of Tripoora Soondaree *v.* Juggunnath, 24 W. R., 321, it was doubted as to whether a covenant not to dispose of a property except to the parties to the covenant was binding on the heirs of the parties. Defendants obtained a lease from plaintiffs in the following terms:—

Right of pre-emption reserved in a conveyance.

"You shall not purchase the jote right of any of the tenants either in your own names or benami; if you do so, the purchase shall be null and void; after the expiry of the term

Covenant by lessee not to purchase under-tenant holding.

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the ijara mehals will come to our khas possession. You shall not be able to raise any sort of objection thereto; if you raise any such objection, it shall be void." The plaintiffs during the term of their lease purchased certain jote rights in execution of decrees for arrears of rent, and brought a suit for recovery of possession of these jotes on the allegation that the defendants had dispossessed them from the same after expiry of their lease; *held* that the stipulation in the deed was a valid one and there was nothing against public policy in such a restriction as was contained in the lease.—Robert Watson *v.* Ram Chand, 1 C. W. N., 174. The benefit of such a covenant runs with the land and an assignee of the lessor can claim such benefit.—*Ibid.*

Sub-section (3). Clause (h):—See notes under s. 67 *ante*. A contract for payment of a higher rate of interest than that provided for in section 67, if entered into before the passing of the Act, is not binding on the person who purchses a tenure or holding at an execution sale.—Matungini Debi *v.* Makrura Bibi, 5 C. W. N., 438, overruling Basanta Kumar Roy Chowdhry *v.* Promotha Nath Bhuttacharjee, I. L. R., 26 Cal., 130. A stipulation for payment of interest upon arrears of rent is an ordinary incident of tenancy in this country unless there is something unusual in the stipulation, and as a rule it attaches to the tenancy so that a purchaser of the tenancy will also be bound by the stipulation.—Rajnarain *v.* Panna Chand, 7 C. W. N., 203, but a sitpulation for the payment of interst at an unusual and an exorbitant rate cannot be supposed to be an incident of a tenancy which would attach to it even after a sale for arrears of rent.—Kali Nath *v.* Trailokya Nath, I. L. R., *26* Cal., 315, 3 C. W. N., 194. Rampini, J., held that by the sale of a tenancy a new contract is created between the auction-purchaser and the landlord at the date of the sale.—*Ibid.* This view of the law was dissented from in a recent case (Second Appeal No. 238 of 1901, decided on the 14th August 1903 unreported). Maclean, C. J., (Geidt, J., concurring) in delivering judgment said as follows:—The rate of interest in this case is exorbitant, but the parties have made their own bargain, and I do not see upon what principle we can make a fresh bargain for them; there are no circumstances in this case of oppression, or undue influence, nor any equitable considerations which would give us right to interfere upon the ground that the bargain was an unconscionable one. Much reliance has been placed in the judgment of Mr. Justice Rampini in the case of Kali Nath Sen *v.* Troylokya Nath Roy, I. L. R., 26 Cal., 315, where he says that under circumstances such as the present, a fresh contract must be regarded as having been entered into between the landlord and the purchaser. I am unable to concur in this view."

Permanent mokurari leases.

179. Nothing in this Act shall be deemed to prevent a proprietor or a holder of a permanent tenure in a permanently-settled area from granting a permanent mokurari lease on any terms agreed on between him and his tenant.

See notes under cl. 8 of s. 3, *ante*, and also notes under s. 5, Tenures. Proprietors

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have had this right since 1812. Section 52 of Reg. VIII of 1793 provided: "The zemindar or other actual proprietor of land is to let the remaining lands of his zemindari or estate under the prescribed restrictions in whatever manner he may think proper; but every engagement contracted with under farmers shall be specific as to the amount and conditions of it; and all sums received by any actual proprietor of land or any farmer of land of whatever description, over and above what is specified in the engagement of the persons paying the same, shall be considered as extorted and be repaid with a penalty of double the amount. The restrictions prescribed and referred to in this section are the following:" And then follows ss. 53 to 60. *Vide* ss. 2 and 3, Reg. V of 1812; s. 2 of Reg. XVIII of 1812; and s. 2 of Reg. VIII of 1819.

Mokarari lease:—Wilson's Glossary has explained "mokarari" to mean "relating to what is fixed: As a revenue term it is applied to a tenure held at a fixed and permanent rate of rent when payable to a proprietor, or revenue when payable to the Government." In Pandit Again Bind *v.* Mohan Bikram, 7 C. W. N., 34, the Court observed: "The words" istamrari" and 'mokarari' are both of Arabic origin and literally they mean continuous (running) and fixed. But what is their meaning when used together as a compound and applied to intermediate tenures. They might mean continuous or permanent during the lifetime of the grantee or permanent as regards hereditary descent.—Lilanund Sing *v.* Manoranjan Sing, 13 B. L. R., 124," 133; Tulsi Pershad Sing *v.* Ram Narain Singh, I.L.R., 12 Cal., 117 to p. 130, P. C. Their lexiographical meaning is therefore of little use to us. We have to see to the customary meaning of the words as established by Judicial decisions. Permanent intermediate tenures at fixed rent were unknown or were seldom recognised in India under the Mahomedans and British Government were at first reluctant to recognize them. The Bengal Code of 1793 passed by the Government of Lord Cornwallis was decidedly against their creation (Reg. XLIV, s. 2). The prohibition was repealed in Reg. L of 1795, s. 2, and Reg. XLVII of 1803, s. 2. The proprietors of revenue-paying estates were first permitted to create them by Reg. V of 1812, s. 2, and Reg. XVIII of 1812, s. 2, and as regards tenures technically known as patni, durpatni, and sepatni, they were first recognised by Reg. VIII of 1819. There is no reference in these Regulations to istemrari-mokurari tenures. Secs. 16 to 19 of Reg. VIII of 1793 refer to mokurari and istemrari proprietary rights held directly under the Government. The words are nowhere defined. They seem to have been used as interchangeable expressions and might apply to grant for life as well as heritable grants. The decisions of the Sadar Dewani Adawlat at Calcutta and of the High Court and the Privy Council itself as to the meaning of the expression istemrari-mokurari were reviewed by their Lordships in Tulshi Pershad Singhi *v.* Ram Narain Singh, I. L. R., 12 Cal., 117, see p. 130. The decisions of the High Court at Calcutta in Lakhu Kowar *v.* Ray Hari Krishna Sing, 3 B. L. R. A. C. 226 and Raja Namnarain Singh *v.* Amir Khan and others, (Unreported) 4th Sept., 1877, were overruled, and their Lordships thus summed up their judgment "After the review of the decisions their Lordships think it is established that the

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words 'istemrari-mokurari, in a patta do not *per se* convey an estate of inheritance but they do not accept the decisions as establishing that such an estate cannot be created without the addition of the other words that are mentioned, as the Judges do not seem to have in their minds that the other terms of the instrument, the circumstances under which it was made, or the subsequent conduct of the parties, might show the intention with sufficient certainty to enable the Courts to pronounce that the grant was perpetual." They added—"As has been said, their Lordships, having regard to the customary meaning of the words, as established by the decisions which have been noticed, are of opinion that they do not convey an estate of inheritance in this case." "In Beni Pershad Koeri *v.* Dadh Nath Roy, 4 C. W. N., 274: I. L. R., 27 Cal., 156; L. R. 26 I. A. 216, their Lordships repeated what they had said in Tulshi Pershad Singhi *v.* Ram Narain Singh, I. L. R., 12 Cal., 117, 130, in the sentence. 'An istemrari-mokurari tenure is not necessarily a perpetual hereditary tenure.' "It has been contended before us that the remarks of the Privy Council as to the effect of the use of the words 'istemrari-mokurari' without words of inheritance such as 'naslan bad naslan,' &c., must be read as referring to grants for maintenance which are *primâ facie* for life only. But we see no reason for such a limitation. The object of the grants in the last two cases might be the maintenance of the grantees, but the grants themselves did not expressly refer to the maintenance of the grantees as the purposes of the grants. In Lilanand Singh *v.* Monorunjun Singh 13, B. L. R., 124, the tenure created was ghatwli, but when speaking of the words 'istemrari-mokurari' their Lordships doubted whether they meant permanent during the life of the persons to whom they were granted or permanent as regards hereditary descent. Their Lordships were not prepared to accept the meaning put upon these words by the High Court in the same case. The observations of their Lordships in the later cases referred to by us were general and not limited to maintenance grants only." A tenant holding under a permanent mokurari lease is not entitled to get abatement of rent by reason of a portion of the land in his occupation having been diluviated by the action of a river. See s. 178 (3) (*f*). —Nunda Lal Mukherjee *v.* Kymuddin Sardar, 9 C. W. N., 886.

Any terms agreed on:—This section is not controlled by s. 67 *ante*. A lease of a *dar-patni taluk*, created on the 13th February, 1886, by the terms of which the defendant was bound to pay rent in monthly instalments, and, if not so paid, to pay interest at the rate of 1 p. c., *per mensem*, is not affected by the provisions of sec. 67 read with those of sec. 178 (3) (*h*), being a permanent lease granted by a permanent tenure-holder in a permanently settled area.—Atulya Charan Basu *v.* Tulsi Das Sarkar, 2 C. W. N., 543. This decision was confirmed by Full Bench in Matangini Debi *v.* Makurara Bibi, 5 C. W. N., 488, overruling Basanta Kumar *v.* Promotho Nath, I. L. R., 26 Cal., 130; 3 C. W. N., 136. Nor is the section controlled by s. 74 *ante*, which declares all impositions upon tenants under the denomination of abwabs, mahluts or other like appellations. In Assanulla Khan Bahadur *v.* Tirtha Gobind, I. L. R., 27 Cal., 680 F. B., the Court after holding that choukidari

Not controlled by s. 67.

Not controlled by s. 74.

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tax which the patnidar had contracted to pay to the zemindar was not an abwab or illegal cess observed: "In the above view of the case it becomes unnecessary to consider the effect of section 179 of the Bengal Tenancy Act, which enacts that "nothing in this Act shall be deemed to prevent a proprietor or a holder of a permanent tenure in a permanently-settled area from granting a permanent mokurari lease on any terms agreed on between him and his tenant." There is, no doubt, some repugnancy between this section and 74 of the Act; but whether, following the principle enunciated by Lord Justice James in Ebbs *v.* Boulnois, we regard the latter, which is a special provision, as a qualification of the former, which is a general one, or, adopting the rules stated by Keating, J., in Wood *v.* Riley, that of two repugnant clauses in a Statute the last must prevail, we give effect to the latter, there seems to be good reason for thinking that section 179 is not controlled by section 74." In the case of Krishna Chunder *v.* Sushila Soondari, I. L. R., 26 Cal., 64; 3 C. W. N., 608, learned Judges said: "Though it is somewhat difficult to suppose that the framers of the Act can have intended to allow proprietors or permanent tenure-holders to stipulate for the payment of *abwabs* by their tenants, yet it may be that it was considered that an arrangement of this nature, so objectionable and liable to give rise to oppression in the case of ordinary rayaits, was fraught with less danger in the case of permanent mokurari leaseholders. Anyhow, the words of section 179 'nothing in this Act' are so wide that it seems impossible to resist the contention of the learned pleader for the appellant, and we are, therefore, constrained to give effect to it."

Utbundi, chur and dearah lands.

180. (1) Notwithstanding anything in this Act, a raiyat—

(*a*) who in any part of the country where the custom of utbundi prevails, holds land ordinarily let under that custom and for the time being let under that custom, or

(*b*) who holds land of the kind known as chur or dearah,

shall not acquire a right of occupancy—

in case (*a*), in land ordinarily held under the custom of utbundi and for the time being held under that custom, or

in case (*b*), in the chur or dearah land,

until he has held the land in question for twelve continuous years; and until he acquires a right of occupancy in the land, he shall be liable to pay such rent for his holding as may be agreed on between him and his landlord.

(2) Chapter VI shall not apply to raiyats holding land under

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the custom of utbundi in respect of land held by them under that custom.

(3) The Collector may, on the application of either the landlord or the tenant or on a reference from the Civil Court, declare that any land has ceased to be chur or dearah land within the meaning of this section, and thereupon all the provisions of this Act shall apply to the land.

Utbundi holding:—The law about the *utbundi* tenures is now settled by this section, which ought to be read with sub-section (2) of s. 20 *ante*. The question as to what is an *utbundi* tenure is discusssed in the Court. There exists in the district of Krishnagur a custom under which tenants can cultivate *khamar*, on payment of certain high rates of rent. In the case of such tenants there existst an implied agreement between the parties that such rent shall be paid, and the amoun of land so cultivated and the rent to be paid for it are ascertained each year by actual measurement. The lands in question are called '*utbundi lands*,' and the rates at which the rent of such lands is payable are called '*utbundi rates*.'—Mirjan Bisvas, *v.* James Hills, 3 W. R., Act X, 159. See Kenny *v.* Ishar Chandra, W. R., Sp. No., 1864, Act X, 9; Dwarkanath *v.* Nabo Sunder, 14 W. R., 193. "Nuksan jote" is very much the same as *utbundi* and there is nothing in an *utbundi* tenure incompatible with the right of occupancy. Where by the custom of a particular locality rent is payable when the land can be cultivated and not payable when the land is not culturable; and the raiyat pays rent for the period that he could cultivate and does not pay when he could not cultivate, he is still to be considered as having held, and having paid the rent sufficiently to come within the meaning of the law.—Premchand *v.* Soorendra Nath, 20 W. R., 329, *per* L. S. Jackson, J. The same learned Judge defines *utbundi* tenures thus: "An *utbundi* tenure is one by which the raiyat holds a certain area of land, but for which he pays rent according to the quantity of that land which year by year he cultivates. The rent varies according to the cultivated area. A zemindar cannot eject tenants who have been holding or cultivating for a period of more than twelve years even though they were originally tenants-at-will."—Hyder Buksh *v.* Bhopendra Deb, 15 W. R., 231. In Beni Madhab Chakravartti *v.* Bhuban Mohan Biswas, I. L. R., 17 Cal., 393, it was held that under sec. 180 of this Act a right of occupancy cannot be gained in a piece of land held on the *utbandi* system, if the possession of the land has not been continuous though it may have commenced more than twelve years previously. In this case their Lordships observed:—"Section 180 of the Bengal Tenancy Act prohibits the acquisition of an occupancy right in land ordinarily let under the custom of *utbandi* until that particular land has been held for twelve years continuously. In this respect *utbandi* land is dealt with in the Act differently from ordinary rayati land in which by sec. 21 a settled raiyat has a right of occupancy, no matter how short a time he has held it. Now it is necessary to enquire what this *utbandi* system really is; for there seems to have been some difference of opinion regarding it

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and perhaps in fact the incidents of that system do vary in different places. Several Judges who have sat in this Court have stated their own opinion on this subject and their opinions have not been quite uniform. Perhaps our safest guide in the matter is what is to be found in special reports made by Revenue officers, and in the descriptions given in the Statistical Account of Bengal compiled by Sir W. W. Hunter from information carefully collected through local officers in the districts where the system exists. When the present Bengal Tenancy Act was under consideration by the Select Committee of the Legislative Council, a memorandum by Mr. Cotton, then a Secretary to the Board of Revenue, was submitted by the Government of Bengal for the information of the Select Committee. Mr. Cotton here reports upon the *utbandi* system and transcribes the passages describing it in the Statistical Account of Bengal in the districts of Nuddea, Jessore, Moorshedabad and Pabna; and he sums up the results. We quote the passage in the Statistical Report relating to the *utbandi* system in Nuddea:—'*Utbandi* is applied to land held for a year, or rather for a season only. The general custom is for the husbandman to get verbal permission to cultivate a certain amount of land in a particular place at a rate agreed upon. When the crop is on the ground, the land is measured and the rent is assessed on it.' Mr. Cotton says, too, that the *utbandi* raiyat abandons altogether (*i. e.*, has no right to claim again) any land, except such as he has under cultivation in any given year. The zemindar may let in jumma to some one any land which the *utbandi* raiyat has not got under cultivation any year. Again, in September, 1884, the Commissioner of the Presidency division submitted to Government an analysis of the reports of his District-officers regarding *utbandi* tenures. The Collector of Nuddea stated that cultivators who take such lands are not obliged to cultivate them a second year; but as a rule they can keep them for certain for three years, if they elect to do so. Generally, the lands under this system are cultivated from one to five years, and then left fallow for the same period. The cultivators acquire no right of occupancy, nor do they desire to do so. These descriptions of *utbandi* do seem to refer rather to particular areas taken for cultivation for limited periods and then given up, than to holdings of which parts are cultivated and other parts lie fallow, while the rent for the whole is assessed year by year with reference to the quantity within the holding under cultivation in that year. A holding of the latter description hardly seems to answer to the general conception of *utbandi* although the rent may be arrived at each year by ascertaining what area has been cultivated. It is not clear to which description the four bighas of the present suit belong, whether they are part of a larger holding once settled with the plaintiff, or whether they form a separate holding which he has from time to time cultivated on the *utbandi* system during a period which has covered more than twelve years. If it is the former case, his right of occupancy would seem to be complete, but if it is the latter case, we are not prepared to hold that cultivation at various times and under separate agreements on each occasion, such periods not being continuous, although of the same piece of land, would confer the right upon the ground that the first of such periods commenced more than twelve years before the alleged dispossession."

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181. Nothing in this Act shall affect any incident of a *ghatwali* or other service-tenure, or, in particular, shall confer a right to transfer or bequeath a service-tenure which, before the passing of this Act, was not capable of being transferred or bequeathed.

Saving as to service tenures.

Ghatwali tenures:—Ghatwali tenures originated in Tappah Sarath or Sewrath, Deogarh, which was formerly part of the Birbhum District, but which has now been incorporated with the Santal Parganas District. They are also to be found in the districts of Bankura, Bhagalpore, Monghyr, Manbhum, Purniah and Patna. Ghatwali tenures of Birbhum formed the subject of legislation in Reg. XXIX of 1814 and Act V of 1859. The former was extended subsequently to Sonthal Parganas and to Pargana Barabhum in the district of Manhbum. There is considerable variety in the tenures known under the general name of Ghatwali in different parts of the country: In Munrunjun Sing *v.* Raja Lilanand Singh, 3 W. R., 84, the High Court said: "They all agree in this, that they are grants of land situated on the edge of the hilly country, and held on condition of guarding the *ghats* or passes. Generally, there seems to be a small quit-rent payable to the *semindar* in addition to the service rendered, and with the view of marking the subordination of the tenure. But in some *semindaris* and *patnis* these tenures are of a major, in others of a minor character. Sometimes the tenure of the great *semindar* himself seems to have been originally of this character. More frequently large tenures, consisting of several whole villages, are held under the *semindar*. And in other places, *e.g.*, in Bishenpore, as explained by Harington (Analysis, Volume III, page 510), the *sirdar* and superior *ghatwals* have small and specific portions of land in different villages assigned for their maintenance. These last, says Harington, are of a nature analogous to the *chakaran* assignments of land to village watchmen in other districts. But he goes on to explain that the *ghatwalli* tenure differed essentially from the common *chakaran* in two respects:—*first*, that the land was not liable to resumption at the discretion of the landholder, nor the assessment to be raised beyond the established rate; and, *secondly*, that although the grant is not expressly hereditary, and the *ghatwal* is removeable for misconduct, it is the general usage, on the death of a faithful *ghatwal*, to appoint his son, if competent, or some other fit person in his family, to succeed to the office." In the case of Lilanand Singh *v.* Manrajan Sigh, I. L. R., 3 Cal., 251, Garth, C. J., observed:—These tenures were created by the Mahomedan Government in early times as a means of providing a police and military force to watch and guard the mountain passes from the invasions of the lawless tribes who inhabited the hill districts. Large grants of land were made in those days by the Government, often to persons of high rank, at a low rent or at no rent at all, upon condition that they should provide and maintain a sufficient military force, to protect the inhabitants of the plains from these lawless incursions; and the grantees on their part sub-divided and re-granted the lands to other tenants (much in the same way as military tenures were

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created in England in the feudal age), each of whom, besides paying generally a small rent, held their lands in consideration of these military services, and provided (each according to the extent of his holding) a specified number of armed men to fulfil the requirement of the Government. This was the state of things at the time when the East India Company by Reg. LXXII of 1791 effected the Decennial settlement of Bengal, Behar and Orissa. By this settlement the amount of land revenue payable by the superior grantees to the Government, which had theretofore been more or less uncertain, was fixed at a certain rate or jama for a period of 10 years. This jama was to be ascertained by the Collector upon equitable principles, to be approved by the Board of Revenue; certain allowances, called malikana and kurchay, were made to the zemindars for their maintenance and disbursements, and one of the conditions of this new holding was, that the zemindars should be responsible as theretofore, for the peace and protection of the district." These tenures were in existence in many parts of the countries long before the accession of the present Government and were grants of land made either by the authority or sanction of Government to certain persons as remuneration for their services as police. The head or sirdar of each of these police-stations was required to keep up a certain number of men properly armed, to apprehend criminals, protect travellers, keep the peace, and to perform other police duties:"—Kastora Koomaree *v.* Monohur Deo, W. R., 1864, 39, 42. "Ghatwali tenures were created by the Mahomedan Government in order to provide both a police and military force to watch and guard the passes on the Western Frontier of Bengal against the lawless hillmen and others." *Per* Ameer Ali and Pratt, JJ., in Narain Mullick *v.* Badi Roy, 6 C. W. N., 94, 96.

Succession to Ghatwali tenures:—Ghatwali tenures in Beerbhum are in fact tenures to be held in perpetuity, and are descendable from generation to generation subject to certain conditions and obligations and the Legislature did not intend that they should devolve on issue of the body only and not on heirs generally according to the law which may govern such succession.—Chattra Dhari *v.* Saraswati, I. L. R., 22 Cal., 156; the words "descendants" in sec. 2 of Bengal Regulation XXIX of 1814 is not be construed in its restricted meaning but includes the widow of a deceased ghatwal.—*Ibid.* Ghatwali tenures as described in Regulation XXIX of 1814 were intended to be the exclusive property of the ghatwal for the time being, and not joint family property in the proper sense of the term.—*Ibid.* Where in a Mitakshara family a ghatwal died having a widow and a separated brother, *held* that the widow was the heiress.—*Ibid.* Long continued possession at a uniform rent may lead to the inference of a fixed permanent ghatwali tenure.—Ramrunjan *v.* Ramnarain I. L. R., 22 Cal., 533, L. R., 22 I. A., 60. The ghatwals of Birbhum are possessed of estates of inheritance without the power of alienation, and this estate cannot be void so long as they perform all the obligations of service and payment of rent incident to their tenures. A perpetual sub-lease granted *bona fide* by a *ghatwal* will be good not only during the tenancy of the grantee but after

Beerbhum Ghatwali tenures.

Reg. XXIX of 1816, s. 2.

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his decease during the tenancy of his heirs.—Deputy Commissioner of Birbhum *v.* Rango Lal Deo, W. R., F. B. No., 34. But a different rule on this latter point was laid down in subsequent cases.—Grant *v.* Bangshi Deo, 15 W. R., 38; 6 B. L. R., 652; Jogeshwar Sarkar *v.* Nilmani Karmakar, 1 B. L. R., s. n., vii, in which it was ruled that a ghatwal is not competent to grant a lease in perpetuity and his successors are not bound to recognize any such incumbrance. Succession to the Birbhum ghatwali tenures is regulated by no *kulachar* or family custom nor by the Mitakshara law but solely by the nature of the tenure, which descends undivided to the party who succeeds to and holds the tenure as ghatwal and who may be a female.—Kastura Kumari *v.* Manohar Deo, W. R., Sp. No., 1864, 39. In Lilanund Sing *v.* The Government of Bengal, 6 Moo. I. A., 101, 4 W. R., P. C., 77, their Lordships of the Privy Council held that the Kharakpore ghatwali tenures are perpetual and hereditary grants of land, which cannot be resumed by Government. In Manranjan Singh *v.* Lilanand Singh, 3 W. R., 84; 5 W. R., 101; 13 B. L. R., 124, the zemindar having come to an arrangement with Government under which the Government dispensed with the services in consideration of an annual sum to be paid in lieu of these services, the zemindar sued to resume the ghatwali lands on the ground that the services on which they were held were no longer required. It was decided, however, that the lands could not be resumed and that the *ghatwals* had permanent hereditary tenures at a fixed jama and could not be evicted except for misconduct. See also Manoraj Sing *v.* Lilanand Singh, 2 B. L. R., 125 note; 13 B. L. R., 124, and Kuldip Narain Singh *v.* The Government, B. L. R., Sup. Vol., F. B., 559; 6 W. R., 199; 11 B. L. R., P. C., 71 s 14 Moo. I. A., 247. But in Lilanand Singh *v.* Sarwan Singh, 5 W. R., 292, it wa held on a consideration of the terms of the lease under which the *ghatwal* held the lands that the zemindar could resume them, when the ghatwali services were no longer required. See also Lilanand Singh *v.* Nasib Singh (6 W. R., 80); Mahbub Hossain *v.* Patasu Kumari, (10 W. R., 179; 1 B. L. R., A. C., 120). A *ghatwali* estate is not necessarily held by males to the exclusion of females.—(Durga Prasad Singh *v.* Durga Kuari, 20 W. R., 154). Upon the death of the ghatwal last seised the lands descend entire to a male heir, as ghatwal:—Lilanand *v.* The Government of Bengal, 6 M. I. A. 101; 442 P. C., 77. By Regulation XXIX of 1814 a hereditary tenure was secured to the ghatwals and their descendants, subject only to the condition of punctual payment of rent assessed upon them and fulfilment of their obligation:—Lall Dhare *v.* Brojo Lall, 10 W. R., 401: where on the death of a ghatwal, the Commissioner of Revenue rejected the claims of the natural heir upon consideration, not of his physical incapacity to perform the duty of ghatwal, but on purely moral considerations, the ground alleged being that the heir evinced such a want of filial respect and dutiful feeling towards his father, that the Commissioner could have no confidence in his performing the duty of his station. *Held* that the Commissioner acted beyond the scope of his authority.—Lall Dharee *v.* Brojo Lall 10 W. R.,

Khurukpore ghatwali tenures.

Physical incapacity of heir to perform duty.

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401 ; such an act of the Commissioner can be questioned by a suit in the Civil Court.—*Ibid.* "Some of these grants were hereditary in their origin and all very soon became so; and it being inconvenient and wholly subversive of the ghatwali system, to admit the element of Hindu law, which requires an equal division of the deceased father's property among his sons, the ghatwail tenure descended undivided to the eldest son, to the exclusion of the others, who either lived with, or were supported by him, or followed their own pursuits. Had the inheritance been regulated by the Mitakshara, or any other system of Hindu law, the property would, in the first generation, have been divided among the sons of the first holder of the tenure, and subdivided among their heirs, the party who succeeds to and holds the tenure as ghatwal must be, and has always been looked upon as sole proprietor thereof, and therefore the other members of the family cannot claim to be co-parceners and entitled to share in the profits of the property, though they may, by the permission and good will of the incumbent, derive their support either from some portion of the property which he may have assigned to them, or directly from himself. And if it be with the nearer members, the distant members of the same family cannot be considered as holding in common with the incumbent, so as to bar the widow or mother's right to succeed. Even, under the Mitakshara Law, the widow and mother would be entitled to succeed, if the property left by the deceased were not held in common; and we have stated above that we do not think that the ghatwali tenure could ever be said, in the sense used in the Mitakshara, to be held in common: "—Kastoora Koomari *v.* Monohur Deo, W. R., 1864. p. 39 (at p. 42).

Some grants are hereditary.

Enhancement rent of Ghatwali tenure:—In a suit for enhancement of the tenure of a Khurackpur Ghatwal it was observed that "the ghatwals come under the denomination of dependent talukdar as defined in Regulation VIII of 1793; and further they are protected by the first clause of sec. 51 of that Regulation, which is very comprehensive and includes all talukdars not included in sec. 5," and that the zemindar has no right, to enforce the payment of an enhanced rent on the ground that their services are no longer required.—Lilanand *v.* Thakor Munranjun, I. L. R., 3 Cal., 251. Where it was admitted that the tenure of the defendant who was a ghatwal dated from a time anterior to the decennial settlement and before the creation of the zemindari, the defendant was held to be protected from any fresh assessment either under sec. 3 or sec. 15 of Act X of 1859:—James Erskine *v.* The Government, 8 W. R., 232. Long possession and gradual cultivation by a ghatwal on payment of a quit-rent are evidence of an implied grant which protects the ghatwal from enhancement.—James Erskine *v.* Manick Singh, 6 W. R., 10. A suit lies to assess the lands in the occupation of ghatwal in excess of the area recorded in the isumnavisi filed by ghatwals.—Raja Jago Jewan *v.* Raghu Nath, 6 W. R., 197.

Khurackpur Ghatwali tenure.

Act X of 1859 ss. 3, and 15.

Long possession.

Manbhum ghatwali.

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Transferability of Ghatwali tenures:—In execution of a money-decree against a ghatwal the decree-holder prayed that the rents and profits that might be due to the ghatwal *minus* the wages payable to chowkidars and other outgoings should be attached and placed in the hands of a Receiver; the Court passed the following order: "Let a prohibitory order issue to the ghatwal not to receive any rent and profits from the raiyats, and also to the raiyats not to pay their rents to the ghatwal;" *held* that the order was bad, that future rents and profits, as such, could not be attached and that the practical effect of the order was that the ghatwal being prevented from recovering the rents and profits in future, would not be in a position to pay the wages of the chowkidars, and so to perform the duty which devolves upon him as ghatwal:—Udai Kumari *v.* Hari Ram, I. L. R., 28 Cal., 483. But if in such a case a Receiver is appointed there will be no difficulty in the Receiver receiving the rents and profits as they fall due from time to time and making provisions for the payment of the wages of the chowkidars and other incidental expenses.—*Ibid.* It has been held in the case of Bally Dobey *v.* Ganei Deo, I. L. R., 9 Cal. 388, that a *shikimi ghatwal* tenure, held under the superior ghatwal, is not liable to be sold in execution, and its proceeds are not liable to attachment for satisfaction of the debt due from its holder. But the rents due to a ghatwal during his lifetime, or rather the profits due to him, after all the ncessary outgoings, can be seized and appropriated by the decree-holder for debts incurred by the ghatwal.—Raj Kishwar *v.* Bunshidhur, I. L. R., 23 Cal. 873, 875. "Ghatwali tenures are not liable either to sale or attachment in execution of decrees [*vide* Sudder Dewanny Adawlat Reports, 1st Sep. (1853)]. They are grants of land given in payment of service, and, although the custom of the country has made them hereditary, they have in no otherwise changed their original character. They are life-tenures only, and the incumbent for the time being has no power to burthen them, after his death, with any of his personal liabilities." *Per* Loch and Glover, JJ.—Kustoora Coomaree *v.* Binode Ram, 4 W. R., Mis. 5. The rents of a ghatwali tenure are not liable for the debts of the fomer deceased holder of the tenure.—Binode Ram *v.* The Deputy Commissioner of Santhal Parganas, 6 W. R., 129; *ibid* on review, 7 W. R., 178. A suit against a jagirdar on account of arrears unpaid by his predecessor must fail, unless he is sued as the legal representative of the late jagirdar, in which case he may be liable to satisfy the arrear out of any assets other than the jaghir which may have come into his hands.—Nilmoni *v.* Madhub Sing, 1 B. L. R., s. c. 195. After deduction of all necessary outgoings, the remainder being his own personal property may be attached in execution of a personal decree against him.—Rajeswar Deb *v.* Bungshidhar, I. L. R., 23 Cal., 873. The same rule has been held to apply in the case of the ghatwali tenures to the south of Birbhum, which are not subject of express legislation.—Bakranath Sing *v.* Nilmoni Sing, I. L. R., 5 Cal., 389; 4 C. L. R., 583; I. L. R., 9 Cal., 187; L. R., 6 I. A., 104. When a ghatwal becomes a defaulter, it is in the power of the authorities

Appointment of Receiver.

Sale in execution.

Seizure of the profits.

Attachment in execution of decree.

Rent of Ghatwali tenure.

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under Reg. XXIX of 1814 to transfer his tenure and that power is not put an end to by the money being offered before the tenure is actually made over to another person.—Chitra Narain *v.* The Assistant Commissioner of SonthalPergunnas 14 W R., 203. As a general principle a *ghatwal* is not competent to grant a lease in perpetuity and his successor is not bound to recognise such an incumbrance.—Narain Mullick *v.* Badi Ray, 6 C. W. N., 94, also Grants and the Court of Wards *v.* Buugshee Deo, I. L. R., 24 Cal. 149. A lease in perpetuity granted by a ghatwal who jointly held with another ghatwal is inoperative even against the ghatwal who grants the lease as the lease is one and indivisible.—Narain Mullick *v.* Badi Ray, 6 C. W. N. 94. The lands of ghatwals of Kharakpore are not capable of alienation by private sale or otherwise, and are not liable to sale in execution of decrees, except with the consent of the zemindar and his approval of the purcahaser as a substitute for the outgoing ghatwal—Lilanand Singh *v.* Durgabati, W. R. Sp. No. 1864, 240 Guman Sing *v.* Grant, 11 W. R., 292. In Anando Rai *v.* Kali Prasad Singh, I. L. R., 10 Cal., 677; 15 Cal., 471, it was held (1) that a *ghatwali* tenure in Kharakpore is transferable, if the zemindar assents and accepts the transfer, which assent and acceptance may be presumed from the fact of the zemindar having made no objection to a transfer for a period of over twelve years, and (2) that in dealing with a *ghatwali* tenure the Court must have regard to the nature of the tenure itself, and to the rules of law laid down in regard to such tenures, and not to any particular school of law or the customs of any particular family, and that a *ghatwali*, being created for a specific purpose, has its own particular incidents and cannot be subject to any.

Khurkpur Ghatwali tenure.

Resumption:—Under the provisions of the decennial settlement of 1789, the Bengal Government in 1790, assessed the whole of the zemindari of Khurackpur, including certain ghatwali lands, at a fixed jumma. This settlement was made perpetual in 1796, under Bengal Regulation I of 1793, at the said fixed jumma. In 1838, the Government set up a claim to resume, for the purpose of revenue assessment, the ghatwali lands in this zemindari, such claim was dismissed, by reason, first, that the ghatwali, lands were part of the zemindari of Khurackhpur and were included in the Permanent Settlement of the zemindari, and covered by the jumma assessed on that zemindari; and second, the lands of ghatwali tenure were not liable to resumption under clause 4, sec. 8, Bengal Regulation I of 1793 as included in allowances made to zemindar for Thana or Police establishments:—Lilanand *v.* The Government of Bengal, 6 M. I. A. 101. A suit for *khas* possession by Government will not lie in respect of ghatwali lands admittedly in a decennially settled Estate, though Government may have a right to claim service from the ghatwals and may compel the nomination of ghatwals to perform such services.—Gadadhur Banerji *v.* The Government, 6 W. R., 326. A right to reinstate a ghatwal in possession of lands cannot exist in the Government or any person or body whatsoever.—Anand Kumari *v.* The Government, 11 W.

Manbhum ghatwali tenure.

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R., 180; the jagirdars were bound, if occasion required it, to protect the paragana from the incursions of wild elephants and might forfeit the tenure if they wilfully failed in the performance of that duty, but were not liable to have their lands resumed, because there was no longer any occasion for the performance of the particular service.—Forbes *v.* Mir Mahomed Taki, 14 W. R., P. C., 28; 5 B. R., 529; 13 Moo. I. A., 438.

Dismissal of a ghatwal:—"It has been doubtless the practice for the Commissioner, or other authority acting on the part of the Government, to enquire into cases of alleged failure to perform the duty of ghatwal or of incapacity to perform such duty, and although I do not wish to express any decided opinion on the question, it is conceivable that a person who has held the office of ghatwal might be removed for good cause and that on removal from office he would be incapable of holding the land:" *Per* Jackson, J., in Lall Dhan *v.* Brojo Lall, 10 W. R., 401. Want of filial respect and dutiful feeling towards his father is no ground for the dismissal of a ghatwal.—*Ibid.* The dismissal of a ghatwal carries with it the forfeiture of his tenure:—The Secretary of State *v.* Poresh Sing, I. L. R., 5 Cal., 740. It was observed by Loch, J., in the case of Kastoori Koomaree *v.* Mundhur Deo, W. R., 1864, p. 39 at p. 42 that ghatwals were liable to dismissal for misconduct or neglect and any stranger could be appointed in their room. "For misconduct and failure to perform the condition annexed to their tenure they, no doubt, are liable to be, and sometimes have been, ejected, and when so vacant, the right of nomination to the office, no doubt, rests with the zemindar. But no instance can be shewn in which the zemindar on his own mere motion has ejected the ghatwal and determined the tenure; we are quite clear that, under the established usage and constitution of the country he cannot do so." Per Trevor and Campbell, JJ., in Munrunjan *v.* Rajah Lilanand, 3 W. R., 84.

Service tenures:—Service tenures are excepted from the operation of sec. 89:—Makbul Hossain *v.* Ameer Sheikh, I. L. R., 25 Cal. 131.

Chowkidari Chakran lands:—The law relating to *chaukidari chakran* lands is to be found in sec. 41, Reg. VIII. of 1793, and Act VI of 1870(B. C.) Part II, ss. 48–61. See Joykishon Mukherji *v.* the Collector of East Burdwan, 1 W. R. P. C. 26; 10 Moo I. A. 16. Where chowkidari chakran lands were transferred to the plaintiffs by the Government, who sought to eject the defendant who was formerly a chowkidar and it was found that the plaintiffs took money from the defendant for the right to cultivate and grow the crops as well as to cut and carry them away, *held* that the relation of landlord and tenant was established between the plaintiff and the defendant and therefore the defendant was not liable to ejectment:—Ram Ranjan *v.* Janki Nath: 4 C. W. N. lxiv. Where a putnidar sought to have transferred to him certain chowkidari chakran lands, which the Government had settled with the zemindar under Act VI of 1870, B. C., and where it was found that the lands were part of plaintiff's putni and that the zemindar had sublet the same to a tenant—.Hari Narain Mazumdar *v.* Mukunda Lal Mandal, 4, C. W. N. 814.

Transfer.

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Resumption of Chakran lands:—Neither the fact that the land has been allowed to devolve from father to son, nor the fact that the tenure was created very many years ago, nor the circumstance that of late the zemindar did not avail himself of the services but still allowed the defendant to hold on, or all those facts taken together, could legitimately lead to the inference that the grant, which was purely in lieu of personal services to be rendered to the zemindar, was of a permanent character, such that the zemindar is not entitled to resume, though the grantee may refuse to perform the services, or the services may be no longer required.—*Per* Prinsep and Ghose, JJ., in Radha Pershad *v.* Budhu Doshad, 22 Cal. 938 (at p. 942). A distinct refusal by a tenant to perform services incidental to his holding renders him liable to ejectment.—Hurrogobindo *v.* Ram Rutno, I. L. R., 4 Cal. 67.

Rusumption.

Notice:—A grantor is not entitled to resume the grant before he gives to the grantee notice dispensing with his services.—Radha Pershad *v.* Budhu Doshad, I. L. R., 22 Cal. 938.

Rent in lieu of services:—Where the original donee ceased to do any services and paid rent in lieu thereof and the rent continued to be paid by his descendants, *held* that no service was to be performed and the tenure was to be held on payment of rent.—Mohendra Singh *v.* Joka Singh, 19 W. R. 211.

Right of occupancy:—*Semble*. No rights of occupancy accrue in lands held under a service-tenure.—Hurrogobindo *v.* Ram Rutno, I. L. R., 4 Cal. 67. But a right of occupancy will grow in a raiyat holding for 12 years or more under a ghatwali tenure holding. See Shome's Law Reports Vol. I.

Service-tenure:—The distinction between a grant for services of a public nature, and one for services, private or personal, to the grantor, is well understood. In the former case the zemindar is not entitled to resume, while in the latter case he may do so, when the services are not required or when the grantee refuses to perform the services:—*Per* Prinsep and Ghose, JJ., in Radha Pershad *v.* Budhu Doshad, 22 Cal. 938 (at p. 941).

Grant for services of a public nature and are for services.

See also Sanniyasi *v.* Salur Zemindar, I. L. R., 7 Mad. 268; Hurrogobindo *v.* Ram Rutno, I. L. R., 4 Cal. 67; Sreesh Chunder *v.* Madhub, S. D. A., 1857, p. 1772; Nil money *v.* Gorernment, 18 W. R., 321; Unide Rajaha *v.* Pemmasamy, 7 Moo. I. A. 128. A distinction exists between the grant of an estate burdened with a certain service and that of an office the performance of whose duties is remunerated by the use of certain lands; in the former case the zemindar is not ordinarily entiled to resume, even if the service is not required, if the grantee is willing and able to perform the services, while in the other case he may do so when the office is terminated.—Radha Pershad *v.* Budhu Doshad, I. L. R., 22 Cal. 938 (at p. 94).

Grant of an estate burdened with a certain service.

Chota-Nagpore ghatwali tenures:—As between two *mal* raiyats with whom a settlement has been made under Reg III of 1877 there may be partition of the waste and jungle land, but it cannot be binding on the superior landlord, the *ghatwal*, and

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will only subsist during the currency of the settlement.—Domare Perti *v.* Panchu Kol, 5 C. W. N., 185.

Burden of proof:—The onus of proof that the lands were the private lands of the zemindar not set apart at the decennial settlement as chaukidari chakaran is on the zemindar.—Muktakeshi Debi Chaudhrani *v.* The Collector of Murshidabad, 4 W. R., 30. The onus is upon an auction-purchaser who seeks to dispossess or to rack-rent grantees under sanads to make out a clear case for resumption.—Forbes *v.* Mir Mahomed Taki, 14 W. R., P. C., 28 ; 5 B. L. R., 529 ; 13 Moo I. A., 438).

Homesteads.

182. When a raiyat holds his homestead otherwise than as part of his holding as a raiyat, the incidents of his tenancy of the homestead shall be regulated by local custom or usage, and, subject to local custom or usage, by the provisions of this Act applicable to land held by a raiyat.

As the wording of the section goes, the homestead spoken of here must be held by a raiyat, and a raiyat is primarily a cultivator (section 5). Persons other than raiyat, therefore, who hold bastoo or homestead land in villages, towns, or cities, *e. g.*, bankers, benians, or traders, do not come under the purview of this section. They will be governed by the old law. Now what should we understand by the word 'raiyats' in this section ? The word is not used in a wide sense for a cultivator or an agriculturist in general but a cultivator, or an agriculturist having relation with the landlord of the homestead. Hence in order to claim the protection of section, not only the person holding the homestead should be a cultivator but he should be a cultivator holding culturable land under the landlord of that homestead, because a cultivator who does not cultivate under such a landlord though he may do so under a stranger, is no more that landlord's raiyat than a banker who holds a homestead under him but possesses no culturable land whatever. The essence of a raiyat is not only cultivation but also payment of rent or acknowledgment of a tenancy. A cultivator is not *ipso facto* a raiyat, though a raiyat may be so. If this were not the correct interpretation of this section, the residents and sojourners of Howrah or any other town, who may have a plot of land in their cultivation in their own village in the country under a certain landlord, may be a raiyat under this section, and claim right of occupancy in a homestead which they may have held in the town under some other persons, and no contract or anything would bar the accrual of such right after 12 years. (Section 178 *ante*). Such a theory would be absurd. The whole Act again is limited by section 4. It contemplates only three classes of tenants, *e. g.*, (1) tenure-holders, *i. e.*, rent-receivers or rent-collectors, (2) raiyats or cultivators, and (3) under-raiyats, and under neither of these heads the holder *per se* of a homestead land would fall. See notes under sections 4 and 5 *ante*. Speaking of raiyat as contemplated by this section, the Legislature contemplates there possible cases. When a homestead is held by raiyat as a part of his holding he is protected under sections 76, 20 and 21 of the Act, and this section does not apply. When however, he does

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not hold it as part of his holding, the incidents of his tenancy shall be regulated by local custom or usage; and when there is no local custom or usage, by the provisions of this Act applicable to land held by a raiyat. Nevertheless in all the three cases, the holder must be a raiyat. It is only the third case that may cause some difficulties. Mr. Field says: "It is to be observed that the provisions of this section apply to raiyats only—See the definition in section 5 *ante*. They do not apply to other persons holding *bastoo* or homestead land in villages, towns, or cities, who continue to be governed by the existing law." This Act does not apply to tenants of homestead lands who are not *raiyats*, such as the *chandina* tenants of Orissa, whose relations with their landlords are regulated by the Contract Act and by case-law. Nor, apparently, does section 182 apply to "tenure-holders," whose rights and obligations are regulated by Chapter III of this Act and by the case-law relating to tenures. The section does not, of course, apply to land which is leased, not for purposes of cultivation or for purposes ancillary thereto, but for establishing a coal depot, since such a lease does not come within the purview of this Act.—Raneegunge Coal Association Ld., *v.* Jadunath Ghose, I. L. R., 19 Cal., 489.

Jurisdiction:—Under the former law, it was decided that where the principal subject of the entire occupation is *bastu* land, the residue (if any) of the holding being entirely subordinate, the Small Cause Court has jurisdiction. But when the principal subject is agricultural land, the buildings being mere accessories thereto, the Small Cause Court will not have jurisdiction.—Chandessari *v.* Ghinah Pandey, 24 W. R., 152. Under the present Provincial Small Cause Act (IX of 1887), however, a Mofussil Small Cause Court has no jurisdiction to entertain suits of arrears of rent of homestead or *bastu* land.—Uma Charan Mandal *v.* Bijari Bewa, I. L. R., 15 Cal., 174.

Incidents of homestead held by a raiyat:—The question as to whether a raiyat will have an occupancy right in his homestead or whether he will be liable to enhancement of rent or ejectment will depend on the question as to whether he holds the homestead as part of his holding. Where a raiyat was a settled raiyat of a village, and took a plot of homestead land in the village, but distinct and separate from his arable holding, and bound himself to give it up on the expiration of a certain period, it was *held* that he had an occupancy-right in the homestead land, since there was no local custom or usage to the contrary, and the raiyat, being a settled raiyat, acquired occupancy-rights, under section 21 (*ante*. page 124), in all the land held by him in the village. In the case referred to the raiyat clearly held the homestead "otherwise than as part of his (arable) holding," and the incidents of the homestead land were held to be regulated by the provisions of this Act applicable to settled raiyats, there being no local custom or usage to the contrary.—S. A. No. 1072 of 1892 decided in 1893 In another case, the defendant had a raiyati holding and some homestead land in a village. He sold both to a certain person, who sold only the bastu land, and the house on it to the plaintiff. The plaintiff was dispossessed by the landlord, and sued to recover possession. It was held that, as the plaintiff did not hold the homestead land as part of his jote, and the agricultural land of the

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original tenant had not been sold to him, he was not a raiyat in respect of the homestead land, and that, as he did not hold the land as a raiyat, the provisions of of this Act did not apply.—Abdul *v.* Kutban 1 C. W. N., clxxi.

Homestead:—With regard to homestead land generally and those not held by the raiyat as part of his holding, the case law is the only guide which we have. The tendency of the judges is to hold that the Permanent Settlement of Bengal has made the zemindars the proprietors of the soil; at any rate it has settled the estate with them, and the zemindars are entitled to enter into every piece of land within their estate, unless barred by any special contract or statutory law; that the occupancy-raiyats are protected by the statute against this right of the zemindars, and so are holders under contract, but that those holders who are not occupancy-raiyats or persons holding under contract to the contrary, have no right to resist the landlord when he wants to enter into the land. To this an exception is made as to customary right that a tenant may possess against the zemindars. Where such custom is proved, the question is set at rest, but it has been held that no length of possession will create such a customary right or confer any right of possession as against the landlord upon the tenant. A question has also further cropped up as to the status of the persons holding under a contract, and it has been held that a contract may be express or implied, and that there may be circumstances from which a presumption may be drawn of a permanent grant. The earliest case on this point is that of Chandra Kumar Rai *v.* Kadermani Dassi, &c., 7 W. R., 247, where a custom was proved that a khudkasht raiyat, who had built a pucca house on the land and acquired a right of occupancy under s. 6 of Act X of 1859, should have the right to transfer. See also Nichan Sahoo *v.* Jhooree Sahoo, (S. D. A. Decis. for Bengal, 1845, p. 243.) In the case of Thakoor Chunder Paramanick &c., B.L.R., F.B., 595, *A*, the widow of *B*, sold a portion of *B's* estate to *C*, who sold to *D*. After *A's* death *E*, the heir of *B*, successfully sued to set aside this alienation as having been made without lawful necessity. The question then arose whether *E* was entitled to certain buildings erected by *D* during *A's* lifetime, and this question was referred to a Full Bench of five Judges (Peacock, C. J., Bayley, Norman, Pundit, and Campbell, JJ.) Peacock, C. J., in delivering the unanimous opinion of the Full Bench said: "We have not been able to find in the laws or customs of this country any traces of the existence of an absolute rule of law that whatever is affixed to, or built on the soil, becomes a part of it, and is subjected to the same rights of property as the soil itself . . . In the case of Khoderam Surma *v.* Trilachan, Select Reports, 35, we find it laid down that 'if a member of a joint Hindu family build a brick house on ancestral land with separate funds of his own, such house would not be a property in which shares might be claimed by his coparceners: coparceners in the land would only have a claim on him for other similar land equal to their respective shares.' That the maxim quicquid plantatur solo solo cedit does not apply in such cases was recognised by the late Sadar Court in the case of Jankee Singh *v.* Bukhooree Singh (S. D. A. Rep. for 1856, p. 761.) That was a suit for the demolition of buildings erected on joint property by a

The maxim quicquid plantatur solo solo cedit does not apply in India.

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member of a joint Hindu family without the consent of his co-sharers. (For similar decisions, see W. G. Nicose Pogose *v.* Niyamatua Ostagor, S. D. A. Rep. for 1851, p. 1517; Sadar Diwani Adalut, North-Western Provinces, 25th November 1863, p. 418; and Kalipersad Dutt *v.* Gauripersad Dutt, 5 W. R., 108.) They show at least that the English rule above alluded to does not prevail in this country. . . . According to the civil law, if a person building on the land of another used his own materials, not knowing that the land was not his own, when the building was destroyed he could reclaim the materials, or if he was in possession of the building, could refuse to deliver it to the owner, unless he was indemnified for his expenses at least so far as they had been incurred profitably to the owner of the soil.—(see Sandars' Justinian, Book 2, tit. 1, para. 39.) We think it clear that, according to the usages and customs of the country, buildings and other improvements made on land do not by the mere accident of their attachment to the soil become the property of the owner of the soil, and we think it should be laid down as a general rule that, if he who makes the improvement is not mere trespasser, but is in possession under any *bonâ fide* title or claim of title, he is entitled either to remove the materials, restoring the land to the estate in which it was before the improvement was made, or to obtain compensation for the value of the building if it is allowed to remain for the benefit of the owner of the soil—the option of taking the building or allowing the removal of the material remaining with the owner of the land in those cases in which the building is not taken down by the builder during the continuance of any state he may possess." In this case, it will be observed, there was no relation of landlord and tenant existing between the parties. In Sibdas Bandapadhya *v.* Bamandas Mukhapadhya, 8 B. L R., 237: S. C., 15 W. R., 360, the assignee of the purchaser of a tenure sold under the provisions of Act VIII (B. C.) of 1865 sued the assignee of the purchaser of a house and the site thereof, such site forming a portion of the tenure, and the house and the site having been separately sold in execution of a decree of the Civil Court. The principle of the above Full Bench decision was held to apply. Norman, J. (Loch, J., concurring), thought that the option to insist on the destruction of a brick-built house and the removal of the materials is one which should and must be exercised promptly or not at all. The original purchaser, the plaintiff's assignor, did not exercise the option, he acquiesced in the continuance of the building on the ground, and sought to make use of his supposed legal right for the purpose of extorting an excessive price or rent for the use of the site of the house. This, it was held, he could not do, and the Court, without expressing a final opinion whether the original purchaser, immediately on acquiring the tenure, could have called on the purchasers at the Civil Court sale to remove the materials of the house and give actual possession of the land, decided that such a right, if it ever existed, had been lost, and that the only right which remained to the plaintiff was that of receiving a fair rent for the land. The judgment in this case contains the following passage: "Let us now see what are the respective rights of landlord and tenant where buildings are erected by a tenant during the tenancy. I think there is no doubt, but that zemindar might object to the

Rights of landlord and tenant when tenant builds on land.

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erection of brick houses on land let for the purposes of cultivation, and if he resorted to a Court of Justice might obtain an order restraining his raiyat from doing anything which would substantially alter the character of the tenure. In the North-Western Provinces it has been held that a tenant, having a right of occupancy, planting trees on his holding without his landlord's permission, or even digging a kutcha well, commits such a breach of the contract of tenancy as warrants the landlord in suing to eject him. But if the landlord, instead of objecting to the erection of a brick house on the holding, were to remain passive and allow a house to be built, knowing as he necessarily would in a case such as that now before us, that the security for the rent would be enormously increased by the erection of the building, it appears to me that he could not afterwards be heard to say that the tenant had done any wrong in erecting the house on the tenure. If in such a case the tenancy should be determined, the position of the parties would appear to be this: The landlord would be the owner of the soil, the tenant of the house. I think it would be contrary to the principles of equity and good conscience to allow the landlord to insist on the needless destruction of a valuable building, or to allow him to claim to remove it, without making to the owner full compensation for its value. I may refer on this point to the Roman Civil Law Institutes. Book 2, tit. 1, section 30, and Digest 7, Book 41, Chap. 1, section 7, 12. By that law, if the person who built was honestly in possession of the land, and the owner of the soil claimed the building, but refused to pay the price of the materials and the wages of the workmen, the claim of the owner might be rejected." In Beni Madhub Banerjee *v.* Jai Krishna Mukherji, &c., 7 B. L. R., 153: S. C., 12 W. R., 495, the zemindar sued to eject three persons as trespassers. They set up a purchase from raiyats who had mourasi and mokurari interests, and this purchase was proved. In the kabuliyats of their vendors, executed some forty years previously, there was a stipulation that pucca houses should not be erected on the land, which was, however, let for building huts and residing thereon. Pucca houses were without objection erected on the land many years (apparently some thirty-five) before the suit was brought. Glover, J., was for ejecting the defendants, but Kemp, J., whose opinion as that of the senior Judge prevailed, took a different view: "Looking to the purpose for which the land was originally leased," said he, "to the fact of the long and uninterrupted occupation of the defendants, their vendors, and the ancestors of those vendors, and to the conduct of the plaintiff in permitting the defendants to erect a pucca dwelling-house on plot No. 1, I do not think it equitable to give the plaintiff a decree to eject the defendants and to take direct possession of the land, and that, too, without any compensation whatever to the tenants, who are to be summarily turned out of house and home." On appeal Mr. Justice Kemp's judgment was affirmed by a Bench of three Judges (Peacock, C. J., L. S. Jackson and Macpherson, JJ.) Peacock, C. J., saying: "Mr. Justice Kemp . . thought that in equity the plaintiff was not entitled to turn the defendants out of the lands, because he stood by and saw them erecting pucca buildings on the land without any objection whatever. If he allowed the defendants to erect pucca buildings upon the land without objecting, it appears to me that he was bound

Effect of acquiescence.

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in the same way in equity as if he had granted them a potta with the privilege of building pucca houses on the land." This case was quoted and followed in Brojonath *v.* Stewart, 8 B. L. R., Ap., p. 51 (*per* Paul J.): and in Durga Persad *v.* Brindabun, 7 B. L. R., 159 (*per* Ainslie, J.)

Reference may also be made to the case of Rani Rama *v.* Jan Mahomed, 3 B. L. R., A. C., 18. Here it was said: "If the plaintiff has a legal title to the land, and has stood by without asserting his rights allowing Imdad Ali to sell to the defendant, standing by while Srinandan has built on and planted the land, in the belief which the plaintiff has encouraged, or at least permitted him to entertain, that he had a good title, it will become a question whether the utmost the plaintiff is entitled to is not to get a reasonable rent from him."—(See the judgment of Mr. Justice Trevor in Hurro Chundro *v.* Hullodhur, W. R., Jan.—July 1864, page 166.)—The decision in that case appears to be in accordance with sound principles of equity. There is a case cited in Story's Equity Jurisprudence (Vol. II, s. 1549.) The Somersetshire Canal Company *v.* Harcourt, 24 Beav., 571, decided on a similar ground: and see also the Rochdale Canal Company *v.* King 16 Beav., 630. The rule of equity is thus stated by Lord Eldon in Dann *v.* Spurrier, 7 Ves., 131: "The Court will not permit a man knowingly though passively, to encourage another to lay out money under an erroneous opinion of title, and the circumstances of looking on is, in many cases, as strong as using terms of encouragement. When a man builds a house on lands, supposing it to be his own or believing he has a good title, and the real owner, perceiving his mistake, abstains from setting him right, and leaves him to persevere in his error, a Court of Equity will not allow the real owner to assert his legal right against the other without at least making him full compensation for the money he has expended." (See also Ramsden *v.* Dyson, L. R., 1 H. L., 1129.) In the case of Peter Nicholl *v.* Tarini Charan Bose, 23 W. R., 298, while it was fully recognized that the landlord had the right to protect the land from damage or injury, and to prevent any use of it, by which its permanent usefulness might be impaired or endangered, a suit for an injunction to restrain brick making and for damages was dismissed, as the landlord had for five and twenty years acquiesced in the land being used for making bricks. In Durga Persad *v.* Brindabun, 7 B. L. R., 159, *A* had permitted *B* to erect a thatched dwelling-house with mud walls on a piece of land belonging to *A*. *B* so occupied the land for more than forty years, whereupon the house and site were sold in execution of a decree against *B*, and were purchased by *C*. It was held that *B* had become possessed of an assignable interest, and that *A* was not entitled to dispossess *C*. A case somewhat similar is that of Bukshoo *v.* Ilahi Buksh, 5 Decis. N. W. P., 365. In the case of Addaita Charan *v.* Peter Dass, 17 W. R., 383; S. C., 13 B. L. R., 417 *note*, the plaintiff, the transferee of the landlord's rights, sued to eject a person who had occupied the land upon which his huts were standing for some thirty years, and ten or twelve years before the institution of the suit had put a katcha-pucca wall round it. A decree for ejectment was passed, the High Court (L. S. Jackson,

Effect of long occupation of land with buildings.

Compare this case with that of Nurput Sing *v.* Nutkoo Ram, 3 Decis. N. W. P., c. 282.

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J.) observing: "It seems to be quite clear that the permissive occupation of land under such circumstance as the defendant has held this land will not give him a right to retain possession of it when the landlord desires to put and end to the tenancy." The question of compensation was here raised, but there was no evidence on the point. Somewhat similar to this case was that of Mohur Ali *v.* Ram Rutun, 21 W. R., 400, in which the defendant was holding "permissively and without any right" (for how long does not appear) a piece of land of very small area and occupied by a shop. The High Court (Kemp and Glover, JJ.) confirmed the decree for ejectment passed by the lower subordinate Court. The facts of this case must have differed from those of the case at 7 W. R., 142, in which the opinion of Kemp, J., prevailed. In this latter case there had been a grant of the land for purposes of residene many years previously. In the case of Prosonno Kumari *v.* Rutton Bepari, I. L. R., 3 Cal, 696, the established facts were that the defendants, their father and grandfather, had been occupying the land for fifty or sixty years, during which time it had been used as a homestead, and occupied by a house and fruit trees. There was no evidence as to the origin of the tenancy, or as to who had built the house or planted the fruit trees. Rent had been regularly paid. The landlord, requiring the land for the erection of a kutchery, served the defendants with notice to quit, and then sued to eject them. It was held that he was entitled to do so. The cases of Shib Dass *v.* Rama Dass and Addaita Charan *v.* Peter Dass were referred to. The High Court, Garth, C. J., and Birch, J., say in their judgment: "There is no law, of which we are aware, in this country, which converts a holding at will, or from year to year, or for a term of years, into a permanent tenure, merely because the tenant without any arrangement with his landlord chooses to build a dwelling-house upon the land demised. Such a law, if it existed, would in a large number of cases lead to great injustice and inconvenience, and would often leave landowners entirely at the mercy of their raiyats. Small kutcha dwellings in this country may be erected in a short time and at a very trifling expense: and if a landlord, as soon as he or his agent discovers such a dwelling to have been erected were obliged, on the one hand, to turn the tenant out, or make him pull down his house; or, on the other hand, as the only alternative, to allow the tenant's permissive holding. to become a permanent tenure, the consequences would often be disastrous to tenants or very unjust to landlords. The truth is that the terms of a holding, as between landlord and tenant, must always be matter of contract, either expressed or implied. If they enter into an express agreement of tenancy, either written or verbal, such agreement generally defines the terms of the holding. If, on the other hand, a tenant is let into possession without any express agreement, and pays rent, he becomes a tenant at-will, or from year to year; or, in other words, holds by the landlord's permission upon what may be the usual terms of such a holding by the general law or by local custom; and in such a case he is, of course, liable to be ejected by a reasonable notice to quit. Occasionally there are local customs by which special terms and incidents are engrafted upon the contract of tenancy; but the existence of the custom in such cases must be matter of proof, and no Judge has a right to act upon such customs unless their existence is duly established. In

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this case no such custom is even suggested, and as there was no express agreement of tenancy, and no evidence of its origin, the defendants must be considered as holding from year to year, and liable to be ejected by a proper notice to quit. . . . ."

"If a tenant wishes to build dwelling-houses upon his land he should take care to make a proper arrangement accordingly with his landlord. He has no right to hire his land for one purpose upon an ordinary permissive holding from year to year, or at will, and then, by using it for another purpose, to convert it, at his own option, and without consulting his landlord's wishes, into permanent tenure. Such a law, if it were in force, would be manifestly unjust to the landlord, and would lead to much litigation and inconvenience. . . . . ."

"In some instances, no doubt, either from expressions used in the contract of tenancy, or from the fact of land having been let by a landlord expressly for the purpose of the tenant building pucca houses upon it, such circumstances, coupled with a long and uninterrupted possession by the original grantee and his descendants, have been held to raise a presumption that the tenure was intended to be permanent: but such cases often create doubt and difficulty, and it is always far safer for a tenant if he means to build, to have the terms of his tenure clearly defined by a written instrument."

In this case no question of compensation appears to have been raised, and the houses were apparently ordinary huts and not brick buildings. There was no evidence that the holding was of a permanent character, or for any defined period.

The principle of this decision was extended (wrongly we submit) to Taruk Podo *v.* Shyama Churan, 8 C. L. R., 50, in which the defendant had been in possession for upwards of 20 years, and the lands had been originally put into the possession of the defendant for building purposes, and the defendant had built mud houses, planted trees, and dug a tank. The Court (McDonell and Field. JJ.) observed: "There is no law in this country which gives anything in the nature of a protected tenure or holding to a person who has occupied such a piece of land, however long may have been the period of his possession." So in Prosunno Kumar *v.* Jugurnath, 10 C. L. R., 25, it was held that, although where land is let for building pucca houses upon it, or where the tenant with the knowledge of the landlord does, in fact, lay out large sums upon the land in buildings or other substantial improvements, that fact, coupled with a long continued enjoyment of the property by the tenant or his predecessor in title, might justify a Court in presuming a permanent grant, specially if the origin of the tenancy could not be ascertained, yet the mere circumstance of tenant occupying buildings upon property will not justify such a presumption, unless it can be shown that they were erected by him or his predecessor, because a landlord might let property of that kind as agricultural land at will or from year to year." (Garth, C. J., and Morris, J.) The course of these decisions has very much changed by the principle laid down in Gobinda Chunder *v.* Aynuddin, 11 C. L. R., 281. The Court (Garth, C. J., and Mitter, J.) observed: "In this case we think that there was quite sufficient ground to justify the Court below in presuming a grant of a permanent nature in favour

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of the defendant's ancentors. It is conceded that the land in question was never let for agricultural purposes. It was apparently let upwards of sixty years ago for building purposes; because it is found that after the grant (whatever it was), these buildings, which are of a substantial character, were erected some sixty years ago by the defendant's ancestors, and that they and their ancestors have lived there ever since. Under those circumstances, we think, the Court below were at liberty to presume, if they thought fit, that the land was granted for building purposes, and that the grant itself was of a permanent character. This has been explained in several recent cases, and amongst others in the case, to which our attention has been called, reported in 10 C. L. R., 25. If the land had originally been granted for agricultural purposes, then the defendants would probably have had another answer to the suit, namely that they had acquired a right of occupancy. But as the circumstances under which the original grant was made tend to show that it was made for building purposes, then the Courts below were at liberty to presume that the grant was of a permanent nature. In the case mentioned by the learned Judge (Prosunno Kumari *v.* Button Bepary, I. L. R., 3 Cal., 696), which he thought governed the case, it did not appear that the defendants or their ancestors had ever built upon the land or laid out any money upon it; indeed it was found by the lower Courts in that case, that such kutcha buildings as were upon the land had not been erected by the defendants." Compare Rangalal Lohia *v.* Wilson, I. L. R., 26 Cal., 204; 2 C. W. N., 718. But in Arut Sahoo *v.* Prandhan Pykara, I. L. R., 10 Cal., 502, the Court below did not raise the presumpotion of a permanent grant and the High Court did not interfere. Most of these cases are discused in Nabu Mandal *v.* Sholim Malik, I. L. R., 25 Cal., 896), in which it was held that mere long possession was not sufficient to justify the presumption of the tenure being of a permanent and transferable nature. In Krishna Kishor Neogi *v.* Mir Mahomed Ali, 3 C. W. N., 255, it was said that a landlord by merely not objecting to his tenant's raising a pukka building does not confer on the tenant a permanent right to remain on the land, and though long possession coupled with the acquiescence of the landlord in the raising of pukka buildings and his receiving rent after such buildings have been raised may justify the inference that a tenant has such a right, yet if the landlord's interest was let out in ijara at the time the building was raised, the absence of objection on his part should not be construed as amounting to acquiescence. Then, in Ismail Khan *v.* Jaigun Bibi I. L. R., 27 Cal., 570; 4 C. W. N., 210), it was held that in a suit for ejectment which a tenant resists on the ground that the tenancy is a permanent one, and that the landlord stood by and permitted him (the tenant) to erect pukka buildings on the land in the belief that the said tenancy was a permanent one, it is incumbent on the tenant to show that in erecting the buildings he was acting under an honest belief that he had a permanent right in the land, and that the landlord, knowing that he (the tenant) was acting under such belief, stood by and allowed him to go on with the construction of the building. The Privy Council, too, on the authority of Ramsden *v.* Dyson, L. R., 1 H. L. 127), has laid down that lessors are not estopped is equity from bringing suits for ejectment merely by reason of their tenants having erected permanent structures on

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the land in the knowledge of and without interference by the lessors.—Beni Ram *v.* Kundun Lal, L. R., 26 I. A., 58; I. L. R., 21 All; 496; 3 C. W. N., 502.

Saving of custom.

183. Nothing in this Act shall affect any custom, usage or customary right not inconsistent with, or not expressly or by necessary implication modified or abolished by, its provisions.

Illustrations.

(1) A usage under which a raiyat is entitled to sell his holding without the consent of his landlord is not inconsistent with, and is not expressly or by necessary implication modified or abolished by the provisions of this Act. That usage, accordingly, wherever it may exist, will not be affected by this Act.

(2) The custom or usage that an under-raiyat should, under certain circumstances, acquire a right of occupancy is not inconsistent with, and is not expressly or by necessary implication modified or abolished by, the provisions of this Act. That custom or usage accordingly, wherever it exists, will not be affected by this Act.

Custom and usage:—The Rent Commission remarked: "We have provided that nothing in the Bill shall affect any custom or customary right not inconsistent with or not expressly or by, necessary implication modified or abolished by, its provisions." The mode of proving custom is not very well understood in this country, and unfortunately notwithstanding a dictum of Sir Barnes Peacock (see Hill *v.* Iswar Ghose, W. R., F. B., 156, and Thakurani *v.* Biseswar, B. L. R., F. B., 326) to the contrary, an idea got to prevail that Act X had superseded all customs, and was intended to do away with all agricultural rights, except those specially mentioned and provided for in that Act. We believe that there are many local customs, in this as well as in every other country, well understood by the people, recognized by the landlords, and susceptible of proof in the Courts of Justice, and we think it very desirable to make it clearly understood that the Bill is not intended to interfere with any of these, unless they have been expressly rescinded by, or are clearly inconsistent with, its provisions." In Lachman *v.* Akbar, I. L. R., 1 All., 440, the plaintiffs as zemindars sued the tenants for a declaration of their manorial rights as against all the tenants collectively to all trees of spontaneous growth, the fruit of mango, mohua, and appropriation by the other trees planted by the defendants, and of their right to receive a tribute of two ploughs annually, as also as an offering of a certain quantity of poppy-seed hemp, bhusa, cow-dung cakes, and other farm produce on the occasion of the marriage of the lower caste tenants, with a further right to levy as dues from the said tenants a proportionate quantity of sugarcane juice prepared by each sugar manufactory, and the presentation of a certain number of sticks of sugarcane on a certain day in each year to the plaintiff. The High Court in remanding the case for further inquiry observed: "The most cogent evidence of custom is not that which is afforded by the expression of opinion as to the existence, but by the enumeration of instances

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in which the alleged custom has been acted upon, and by the proof afforded by revenue or judicial records or private accounts and receipts that the custom has been enforced." To prove a local custom, evidence must be precise and conclusive.—Tekait Durga Prosad *v.* Tekait Durga Kumar, 20 W. R., 154. The custom must be of that part of the country where the tenancy is situate.—Annapurna *v.* Uma Charan, 18 W. R., 55. Until some connection, either geographical or political is shown to exist between any two districts, there is no ground for inferring the custom of one district from its existence in another.—Maharani Heyanath *v.* Burni Narain, 17 W. R., 329. In Kupil Rai *v.* Radha Prosad Sing, I. L. R., 5 All., 261, it appeared that the defendants were occupancy-tenants of certain lands, that these lands submerged and reappeared after some years, that the tenant neither relinquished nor paid rent for them; it was held that the claim of the landlord that he was entitled to them, according to a local custom, was not tenable with reference to the provisions of Act XII of 1881 (N. W. P., Rent Act).—See Luchmiput v. Sadatulla, 12 C. L. R. In Lala *v.* Hera Singh, I. L. R., 2 All., 50, the claim was for the recovery of a cess which it was alleged was payable in accordance with the custom of the village on the second marriage of a widow of the Ramaiya caste. In dismissing the suit, Oldfield, J., observed: "Amongst the conditions essential for establishing a custom are that the custom is of remote antiquity, that it has been continued and acquiesced in, that it is reasonable and certain, and not indefinite in its character." Stuart, C. J., concurred in the above view..—See also Dwarkanath *v.* Hurish Chandra, I. L. R., 4 Cal., 925; Ram Luksmi v. Perumal, 12 B. L. R., 396; Hara Prosad *v.* Shiv Dayal, 26 W. R., 55, B. C.; Luchman *v.* Akbar, I. L. R., 1 All., 440. In Chandra Kumar *v.* Pearee Lal, 6 W. R.; 160, it was held that a custom as to the transferability of khudkast jotes need not be absolutely invariable. According to the custom of the Hooghly District, a tenure granted for building purpose is transferable.—12 W. R., 495. In an inquiry as to whether tenures of a certain class are transferable according to local custom, it is sufficient if there is credible evidence of the existence and antiquity of the custom, and none to the contrary; there is no necessity for the witnesses to fix any paricular time from which such tenures become transferable.—11 W. R., 318. It is doubtful if any distinction obtains in this country between usage and custom.

Usage.

The English law recognises the following distinction: "Usages known as customs of the country, although not customs, if strictly so called, are usages existing generally in a district, and will, unless expressly or impliedly included by the contract, be imported into and regulate contracts of tenancy, although the contract be in writing or in deed"—(Wiglesworth *v.* Dallison, 1 Smith, L. C., 598; see Woodfall, L. & T., 707). In Jugomohan *v.* Manik Chand, 7 Moore's I. A., 263, their Lordships of the Judicial Committee observed: "There needs not the antiquity, the uniformity or the notoriety of custom, which in respect of all these becomes a local law. The usage may be still in its growth; it may require evidence for its support in each case; but in the result it is enough if it appear to be so well known and acquiesced in that it may be reasonably presumed to have been an ingredient tacitly imported by the parties in their contract." In the case

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of Pulakdhari Rai *v.* Manners and others, I. L. R., 23 Cal., 179, an attempt has been made to draw a distinction between a custom and a usage upon the languages of this section. The learned Judge (Prinsep, J.) observed: "Although no reference was expressly made in section 183 itself in regard to the validity of a transfer in accordance with usage which may be established by evidence of a less substantial character that required to prove a custom, illustration (1) to section 183 seems to show that this was contemplated by the Legislature. That explanation is as follows: 'A usage under which a raiyat is entitled to sell his holding without the consent of his landlord is not inconsistent with and is not expired or by necessary implication modified or abolished by the provisions of this Act, that usage accordingly wherever it may exist will not be affected by this Act.'" He quoted the observations of their Lordships the Privy Council Judges in Jugo Mohun *v.* Manik Chand, 7 Moore's I. A., 263, cited above and observed: "In applying this case it must be borne in mind that it relates to a usage in dealing in particular class of mercantile transactions and contracts made in the course of such business. Consequently in introducing these principles in the present case, which does not relate to contracts entered into between the parties to litigation but affects a third party, the landlord, it would be necessary either to prove the existence of the usage on his estate or that it is so prevalent in the neighbourhood that it can be reasonably presumed to exist on that estate. It may be that the usage may have gradually sprung up all round an estate, and yet never have been introduced on it or been recognised on it, and therefore in considering the evidence it is of much importance that this should be taken into consideration in connection with the conduct of the landlord in regard to any such transfers as may have taken place without his consent." The learned Judges in the case of Dalgeish *v.* Guzuffer Hossain, I. L. R., 23 Cal., 427, went further and observed: 'The word usage at any rate would include what people are now or recently in the habit of doing in a particular place. It may be that this particular habit is only of a very recent origin, or it may be one which has existed for a long time. If it be one regularly and ordinarily practised by the inhabitants of the place where the tenure exists, this would be usage within the meaning of s. 183.'" The following extract from Broom's Commentary on the Common Law will be interesting on this subject and useful:—The *lex non scripto* is an unwritten law, comprising those principles, usages, and rules of conduct, applicable to the Government and security of person and property, which do not depend for their authority upon any existing, express and positive declaration of the will of the Legislature. It comprises, and mainly consists of, 'customs,' whether general or particular, and has been often called the customary law.'* "These customs date from a remote antiquity†, and are in

"Lex non scripta."

* See 1 Bla Com.' 68. "A general immemorial usage not inconsistent with any statute, especially if it be the result of evident necessity, and withal tendeth to the public safety, is, I apprehend, part of the Common Law of England."—*Per* Foster, J. (R. v. Broadfoot, 18 How. St. Tr. 1331.)

† "The law and custom of England is the inheritance of the subject, which he cannot be depirved of without his assent in Parliament."—12 Rep., 29.

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some instances believed to have originated from Acts of the Legislature of which no trace or record now remains. It has, therefore, been justly said, that the *lex non scripta* consists of those rules and maxims concerning the persons and property of men which have obtained by the tacit assent and usage of the inhabitants of this country, and have the same force and authority as Acts of Parliament; the only difference between the two being, that the consent and approbation of the people with respect to the one is signified by their immemorial use and practice, whereas their approbation of, and consent to, the other, is declared by Parliament to whose enactments every member of the community is considered as virtually a party.* Although in all probability, it is only partially true that our customary or unwritten law flows from the express act or sanction of the supreme power, yet it may be curious to remark that something very similar, or, at all events, analogous to such a mode of derivation, has actually occurred almost within living memory in the United States of America, where it is an established doctrine that English Statutes, passed prior to the Declaration of Independence, or, at all events, to the emigaration of the forefathers of the American people, so far as applicable to their institutions, must be taken to constitute a part of the Common Law of that realm.† This proposition has been broadly laid down by some of the most eminent Judges of the United States, and will serve to illustrate the manner in which the statute law, or *lex scripta*, of a country, though ceasing to be operative as such, may become blended with, or even form an integral and ascertainable portion of, its unwritten law.

General customs.

Customs may be either *general* or *particular*. As referable to general customs properly so called, Sir W. Blackstone specifies‡ that rule of law which settles the course in which lands descend by inheritance, that rule which prescribes the solemnities and obligation§ of contracts, which declares the principles applicable to the expounding of wills, deeds, and Acts of Parliament, which indicates the respective remedies of civil injuries. Doctrines, such as these, he remarks, are not set down in any written statute or ordinance, but depend merely upon immemorial usage for their support. "It is here to be observed, on the one hand, that the *lex non scripta* might, in some imaginable cases, control the statute law, as if that law were against common right and reason, or repugnant or impossible to be performed.‖ And, on the other hand, it is noticeable that our customary law will, in many cases nullify the acts and contracts of individuals, and will even interfere with the dispositions which they may make of their private property. A 'man,' for instance, 'cannot alter the usual line of descent by a creation of his own.'¶ He cannot give an estate in fee simple

* 1 Reeves Hist Eng. Law, 2nd ed., 2; see 1 Bla. Com., 64, 68.

† 1 Kent Com., 10th ed., 535, and note thereto.

‡ Com., 68.

§ As to the obligatory force of contrats, *post*, Book II, Chap. I.

‖ Dr. Bonham's case, 8, Rep., 118a; per Best, J., Forbes v. Cochrane, 2 B. & C., 471; Treat Eq., 2; Arg. Gorham v. B. P. of Exeter, 5 Exch., 671; Dwarr. Stats, 2nd ed., 480-4.

¶ *Per* Lord St. Leonards, Egerton v. Earl Brownlow, 4 H. L. Ca., 2

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to a person and his heirs on the maternal side, because the law has already said how a fee simple estate shall descend. In this case, the law does not allow of a capricious disposition of property, and still less will it sanction the attaching of any condition to property which is against the public good. Thus, a case occurs in the old books of a man making a condition that his devisee should not cultivate his arable land which is void because, it is against the prosperity of the country and for no other reason.‖ But although the law of England will not allow a man to indulge in every fanciful disposition of his property, it will allow him to put his estates in settlement for the purpose of providing for those who are to come after him, and in doing so, it gives him all the rational power of disposition which he can reasonably desire. Even upon the power of disposition by settlement, it will, however, impose such limits and restraints as are required by considerations having reference to the public good : the principles which govern its decisions upon this subject being embodied in the maxim, *Sic utere tuo ut alienum non lædas* (which applies to the public in at least as full force as to individuals), and in the equally expressive maxims, *Nihil quod est incove niens est licitum and Salus republicæ suprema lex.** "Conspicuous amongst general customs stands the *lex mercatoria* or law merchant,† a branch of law deduced from the practice and customs of merchants aided and regulated by a long series of judicial decisions, as also by the express enactments of the Legislature, which has, especially of late years, exercised much vigilance in aiding fair commercial enterprise on the one hand, and in checking undue speculation on the other. "To evidence of mercantile custom, which, when established and shown to prevail generally,‡ becomes part of our common law, much weight is attached in Courts of Justice; and, in illustration of this remark, a reference to Bellamy *v.* Marjoribanks,§ which involved an important question as to the precise effect of crossing a cheque, may suffce. At the trial of that case (as appears from the report), some of the most eminent bankers, and the most experienced bankers' clerks in London were examined as to to existence of a particular custom alleged by the plaintiff in his declaration, and denied by the defendant, and the Court, in adjudicating upon a motion for a new trial on the ground, *inter alia*, that the verdict was against evidence, admitted that a custom such as that contended for would be binding and obligatory upon bankers if proved; and that it might be proved 'by a long, well-known, acknowledged, and universal usage and practice amongst bankers to act in accordance with it.' "So in Brandon *v.* Barnett,‖ Lord Campbell remarks that, 'the general lien of banker is part of the law merchant, and is to be judicially noticed, like the negotiability of bills of exchange or the days of grace allowed for their payment. When a general usage has been judicially ascertained and established it becomes part of the law merchant, which Courts of Justice are bound to know and recognise. Such has been

Lex mercatoria.

* See *per* Lord Truro, 4 H. L. Ca., 195.

† As to which, see Ram Sci. Leg. Judgment, Chap. 8; 1 Bla. Com., 273; 8 C. B., 967, note (a).

‡ As to custom or usages of trade prevalent in particular places, post, p. 19.

§ 7 Each., 389. As to the existing law with reference to crossed cheques, post, Book 11 Chap., 3.

‖ 3 C. B., 519, 530; S. C., 12 C. & F., 787; per Best C. J., 5 Bing., 164.

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the invariable understanding and practice in Westminster Hall for a great many years; there is no decision or dictum to the contrary, and justice could not be administered if evidence were to be given *toties quoties* to support such usages, an issue being joined upon them in each particular cases.'*

Particular or local custom.

A *particular* or *local* custom may be defined to be an usage which 'has obtained the force of law and is in truth the binding law within a particular district or at a particular place of the persons and things which it concerns.' † A custom, therefore, in so far as it extends, supersedes the general law.‡ "Such, according to Blackstone,§ is the custom of gravel kind in Kent and some other parts of the kingdom which ordains, among other things, that not the eldest son only of the father shall succeed to his inheritance, but all the sons alike; and that, though the ancestor be attainted and hanged, yet the heir shall succeed to his estate without any escheat to the lord. Such is the custom which prevails in divers ancient boroughs and therefore called borough-English, that the youngest son shall inherit the estate in preference to all his elder brothers.‖ Such is the custom in other boroughs, that a widow shall be entitled for her dower to all her husband's lands, whereas at the common law she shall be endowed of one-third part only. Such also are the special and particular customs of manors of which every one has more or less, and which bind all the copy-hold and customary tenants who hold of the said manors.¶ "Now all these, and similar special customs being deviations from the general law of the lands are good only by virtue of long-continued usage and of that consent, on the part of such portions of community as are more immediately affected by them, which is to be implied therefrom.*

Custom whence it dates &c.

"1. A custom, therefore, says Sir W. Blackstone, in order that it may be legal and binding, must 'have been used so long that the memory of man runneth not to the contrary,; so that if anyone can shew the beginning of it, it is no good custom. For which reason no custom can prevail against an express Act of Parliament, since the Statute itself is a proof of a time when such a custom did not exist.'** Now legal memory dates from the first year of the reign of Richard I; but it must not, therefore, be supposed that it was even prior to the Stat. 2 & 3 Will. IV, c. 71, in all cases necessary to produce evidence extending over so long a period of the existence of a particular custom in dispute. From proof of the enjoyment of a custom for a much less period, *e.g.*, for so short a time as twenty

* Cited per Byles, J., Hare v. Henty 10 C. B., N. S., 85.

† Judgm., Tyson v. Smith, 9 Ad. & E., 421: per Yates, J., Millar v. Taylor, 2 Burr., 2368. In Cox v. Mayor of London, 2 H. & C., 401; S. C, 1 *id.*, 338, 357, a custom of the City of London was held to be void in law, as violating "every principle of justice and every rational rule of jurisprudence and procedure."

‡ Judgm., Lord Falmouth v. George, 5 Bing., 293.

§ 1 Com., 74-5.

‖ See Muggleton v. Barnett (in Error), 2 H. & N., 653; S. C., 1 *id.*, 282.

¶ See per Cockburn, C. J., Muggleton v. Barnett, 2 H. & N., 681. As to manorial customs, see Richardson v. Walker, 2 B. & C., 827; per Lord Cranworth, Marquis of Salisburry v. Gladstone, 9 H. L. Ca., 701

** 1 Bla. Com., 76.

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years, a jury has, in the absence of evidence to the contrary, been held justified in finding that the custom has existed immemorially.* And now where a claim 'may be lawfully made' at the common law, by custom, prescription,† or grant to any right of common or other profit or benefit to be taken and enjoyed from or upon 'the land of any person,' or 'to any way or other easement or to any watercourse, or the use of any water to be enjoyed or derived' upon or from the land of any person, reference will have to be made to the 1st and 2nd sections ‡ respectively of the Statute just mentioned, which was passed with a view to 'shortening the time of prescription in certain cases.'

Custom must have been continued.

"2. A custom must have been *continued* because 'any interruption would cause a temporary ceasing; the revival gives it a new beginning which will be within time of memory, and thereupon the custom will be void. But this must be understood with regard to an interruption of the *right*; for an interruption of the *possession* only for ten or twenty years will not destroy the custom. As, if the inhabitants of a parish have a customary right of watering their cattle at a certain pool, the custom is not destroyed, though they do not use it for ten years, it only becomes more difficult to prove; but if the *right* be anyhow discontinued for a day, the custom is quite at an end.'§ Where a custom has been thus 'continued' in the sense above assigned to that term, it in fact comes at last to an agreement which has been evidenced by such repeated acts of assent on both sides from the earliest times, beginning before the time of memory, and continuing down to our own times, that it has become the law of the particular place wherein it has been shown to obtain.‖

And peaceably enjoyed.

"3. A valid custom must have been *peaceable*, and acquiesced in, not subject to contention and dispute; for, as such a custom derives its force and authority from common consent, the fact of its having been immemorially disputed either at law or otherwise would be a proof that such consent was wanting. ¶

Custom must be reasonable.

"4. A custom must be reasonable, or rather it must not be unreasonable.** 'A custom,' therefore, 'may be good, though the particular reason of it cannot be assigned, for it sufficeth, if no good legal reason can be assigned against it. Thus, a custom in a parish that no man

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* Jenkins *v.* Harvey, 1 Cr. M. & R., 877; cited Master Pilots, &c., of Newcastle-upon-Tyne *v.* Bradley, 21 L. J. Q. B., 196; S. C., 2 E. & B., 428n.; R. *v.* 'Joliffe, 2 B. & C., 54. See also Duke of Beaufort *v.* Smith, 4 Exce., 450.

† The distinction between custom and prescription is this. The custom is a local usage not annexed to any person, whereas prescription is merely a personal usage as that S and his ancestors or those whose estate he has have used time out of mind to enjoy a particular advantage or privilege—2 Bla. Com., 263; *per cur.*, Mayor of Lynn Regis *v.* Taylor, 3 Lev., 160.

‡ Upon which see Mr. Shelford's notes in his 7th ed. of the Real Prop. Stats., pp. 2, 6.

§ 1 Bla Com., 77.

‖ Judgm., Tyson *v.* Smith, 9 Ad. & E., 425.

¶ 1 Bla. Com., 77.

** 1 Bla. Com., 77; Hix *v.* Gardiner, 2 Bulstr., 195.

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shall put his beast into the common till the 3rd of October would be good; and yet it would be hard to show the reason why that day in particular is fixed upon, rather than the day before or after. But a custom that no cattle shall be put in till the lord of the manor has first put in his is unreasonable, and, therefore, bad: for peradventure, the lord will never put in his, and then the tenants will lose all their profits.'* A custom, however, is not unreasonable, merely because it is contrary to a particular maxim or rule of the common law, for *consuetudo ex certâ causâ rationabili usitata privat communem legem*, as the customs of gravel kind and borough-English, which are directly contrary to the law of descent, or again, the custom of Kent, which is contrary to the law of escheat.† Nor is a custom unreasonable because it is prejudicial to the interests of a private man, if it be for the benefit of the commonwealth: as the custom to turn the plough upon the headland of another, in favour of husbandry or to dry nets on the land of another in favour of fishing, and for the benefit of navigation,‡ or to take water from his well.

"It is not an unreasonable custom that a tenant§ who is bound to use a farm in a good and tenantable manner, and, according to the rules of good husbandry, shall be at liberty, on quitting the farm, to charge his landlord with a portion of the expenses of draining land which requires draining according to good husbandry, though the drainage be done without his landlord's knowledge or consent.‖ And a custom that a tenant shall have the way-going crop, after the expiration of his term, is reasonable and good It is just; for he who sows ought to reap, and it is for the benefit and encouragement of agriculture. It is, indeed, against the general rule of law concerning emblements, which are not allowed to tenants who know when their term is to cease, because it is held to be their fault or folly to have sown when they knew their interest would expire before they could reap. But the custom of a particular place may rectify what otherwise would be imprudence or folly.¶ In the Marquis of Salisbury v. Gladstone,** a custom was held not unreasonable for the copy-holders of inheritance in a manor without license from the lord to dig and get clay without limit in and from their copyhold tenants, for the purpose of making bricks to be sold off the manor.

"5. A custom ought to be certain. And, therefore a custom that lands shall descend to the most worthy of the owner's blood, is void; for how shall this worth be determined? But a custom that

Custom must be certain.

* 1 Bla. Com., 77.

† Ante, p. 11.

‡ Judgm., Tyson v. Smith, 9 Ad. & E., 421; Lord Falmouth v. George, 5 Bing., 286. Race v. Wards, 4 E. & B., 702.

§ As to customs of the country affecting the relation of laudlord and tenant. , p. *post* 19.

‖ Mousley *v.* Ludlam, 21 L. J., Q. B., 64; Dalby *v.* Hirst, 1 B. & B., 224. With reference to the reasonableness of particular alleged customs, see also Mounsey *v.* Ismay, 1 H. & C., 729; Hilton *v.* Earl Granville, 5 Q. B., 701, commended on and followed in Blackett v. Bradley, 1 B. & S., 940, 954-5; Rogers v. Brenton, 10 Q. B., 26; Elwood *v.* Bullock, 6 Q. B., 383; Gibbs *v.* Flight, 3 C. B., 581; Reg. *v.* Dalby, 3 Q. B., 602; Le Case de Tanistry, Davys, 28b., 34.

¶ Wigglesworth v. Dallison, Dougl., 201.

** 6 H. & N., 123; S. C., 9 H. L. Ca., 692; followed in Blewett, App., Jenkins, resp., 12 C. B., N. S., 16, 30.

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lands shall descend to the next male of the blood exclusive of females, is certain, and therefore good. So a custom to pay twopence an acre in lieu of tithes is good; but to pay sometimes twopence, and sometimes threepence, as the occupier of the land pleases, is bad, for its uncertainty.* On the ground of uncertainty the following custom was held bad: *viz.*, for all the customary tenants of a manor, having gardens, parcels, of their tenements, to dig, take and carry away from a waste within the manor, 'for the purpose of making and repairing grassplots in the gardens, parcels of the same respectively, for the improvement thereof such turf covered with grass fit for the pasture of cattle, as hath been fit and proper to be so used and spent every year, at all times in the year as often and in such quantity as occasion' may require.† 'A custom,' said Lord Ellenborough, C.J., with reference to this case, 'however ancient must not be indefinite and uncertain; and here it is not defined what sort of improvement the custom extends to.' And he added, 'there is nothing to restrain the tenants from taking the whole of the turbary of the common, and destroying the pasture altogether. A custom of this description ought to have some limit; but here there is no limitation to the custom as laid but caprice and fancy.'‡ But a custom to pay a year's improved value by way of fine on a copy-hold estate might be good though the value is a thing uncertain; for it may at any time be ascertained, and the maxim of law is *Id certum est quod certum reddi potest.*** In Broadbent *v.* Wilks,†† we have an instance of a custom being held void on the two-fold ground that it was unreasonable and uncertain. There the custom claimed (so far as it need here be stated) was, that when and as often as the lord of the manor, or his tenants of the collieries or coal mines, sunk pits in certain free-hold lands within and parcel of the said manor, for the working of the said pits, and to get coals thereout, the lord and his tenants might cast the earth, stones, &c., coming therefrom, in heaps 'on the land near to such pits,' 'there to remain and continue' at 'his and their will and pleasure': in giving judgment with reference to the validity of this custom, Willes, C. J., remarks: The objection that this custom is only beneficial to the lord, and greatly prejudical to the tenants, is, we think, of no weight, for it might have a reasonable commencement, notwithstanding for the lord might take less for the land on the account of this disadvantage to his tenants. But the true objections to this custom are, that it is uncertain, and, likewise, unreasonable, as it may deprive the tenant of the whole benefit of the land; and it cannot be presumed that the tenant at first would come into such an agreement.' He also remarks that every custom 'must be certain for two plain reasons: *1st*, because, if it be not certain, it cannot be proved to have been time out of mind, for how can anything be said to have been

* 1 Bla Com, 78; Le Case de Tanistry, Davys, 28 B., 35; Blewett *v.* Tregonning, 3 Ad. & E.. 554.

† Wilson *v.* Willes, 7 East., 121.

‡ See also Clayton *v.* Corby, 5 Q. B., 415; Bailey *v.* Stephens, 12 C. B., N. S., 91; Constable *v.* Nicholsen, 14 C. B., N. S., 230 Douglas, App., Earl Dysart, resp., 10 C. B., N. S., 688.

** 1 Bla. Com., 78; Leg. Max., 4th ed., 599.

†† Willes, 360; S. C. (in Error), 1 Wils., 63; 2 Str. 1224; with which compare Rogers *v.* Taylor, 1 H. & N. 706; Carlyon *v.* Lovering, id., 784.

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time out of mind when it is not certain what it is? *2ndly*, it must be certain, because every custom presupposes a grant, and if a grant be not certain it is void.' The Chief Justice then observes that, tested by the foregoing rule, the custom above set out is bad, as being neither certain nor intelligible; specially by reason of the expression 'near to' used in setting out the custom, to which expression no precise and definite meaning can be attached. After thus pointing out the uncertainty of of the alleged custom, Willes, C. J., proceeds to say, that all customs must be reasonable, otherwise they are void, 'and certainly no custom can be more unreasonable than the present. It may deprive the tenant of whole profits of the land, for the lord or his tenants may dig coal-pits when and as often as they please, and may, in such case, lay their coals, &c., on any part of the tenant's land, if near to such coal-pits, at what time of the year they please, and may let them lie there as long as they please;' so that 'they may be laid on the tenant's land and continue there forever, though it may be more convenient for the lord to bring them on his own land, which is absurd and unreasonable.'

"6. A custom, though established by consent, must, when established, be compulsory, and not left to the option of every man, whether he will use it or not; therefore a custom that all the inhabitants of a particular district shall be rated toward the maintenance of a bridge will be good; but a custom that every man is to contribute thereto at his own pleasure, is idle and absurd, and indeed no custom at all.*

Customs must be compulsory.

"7. Customs must be consistent with each other—one custom cannot be set up in opposition to another; for, if both are really customs, then they are of equal antiquity, and must have been established by mutual consent, which to say of contradictory customs is absurd.† "With reference to the interpretation of customs, it will suffice to say that customs, especially where they derogate from the general rights of property, must be construed strictly; ‡ they are not to be 'enlarged beyond the usage;' § they may be abrogated by statute.‖ "Besides local customs properly so called, there are in different parts of the country certain usages existing, which, unless excluded expressly or impliedly by agreement between parties¶ regulate, to some extent, the relation of landlord and tenant, or affect the reciprocal rights of incoming and outgoing tenants, and are usually known 'as customs of the country.' Now, a custom ** belonging

and consistent.

Customs how construed.

Customs of the country.

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* 1 Bla. Com., 78.

† *Id.*

‡ Judgm., Rogers *v.* Brenton, 10 Q. B., 57; 1 Bla. Com., 78; *per* Bayley, J., 2 B. & C., 839.

§ Judgm., Arthur *v.* Bokenham, 11 Mad., 160; see *per* Cockburn, C. J., 2 H. & N., 680-1.

‖ Truscott *v.* Merchant Tailors' Co., Exch., 855; Cooper *v.* Hubbuck, 12 C. B., N. S., 456. See, for instance, Stat., 19 and 20 Vict., C. 94.

¶ *Post*, Book II.

** The word 'custom" thus used "cannot mean a custom in the strict legal signification of the word: for that must be taken with reference to some defined units or space, which is essential to every custom properly so Called:" *per* Lord Ellenborough, C. J., Legh *v.* Hewett, 4 East., 154, 158.

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to this class need not be shown to have existed immemorially, but will be established on proof of a usage, recognized and acted upon in the particular district, applicable to farms of a like description with that in regard to which its existence is specially asserted.* A "custom of the country" in order that it be good, must be reasonable (as will appear by reference to some of the cases already cited), and sufficiently definite and certain. Very similar to the local usages last mentioned, as regards their operation upon the contracts of parties, are particular usages of trade which exist in certain places, and in order to be effective, must be reasonable (*a*), and must be proved by apt evidence in courts of justice. The legal effect of these usages of trade I shall hereafter notice, when treating of mercantile contracts' they cannot, in strictness, be considered as forming part and parcel of our customary law (*b*). The characteristics of customs and usages and the conditions of their validity have been much misunderstood. According to the view of customary law taken by Mr. Austin (Jurispr udence, Vol. I, 148, Vol II, 229), a custom can never be considered binding until it has become a law by some Act, legislative or Judicial, of the sovereign power. Language pointing to the same view is to be found in one judgment of the Madras High Court.—(See Narasammal *v.* Balaram Chria, I Mad. H. C., 424.) But such a view cannot now be sustained. it is open to the obvious objection that in the absence of legislation, no custom could ever be judicially recognised for the first time. A decision in its favour would assume that it was already binding. The sounder view appears to be that law and usage act and react upon each other. A belief in the properiety or the imperatlve nature of particular course of conduct, produces a uniformity of behaviour in following a particular course of conduct, produces a belief that it is imperative or proper to do so. When from either cause or both causes, a uniform and persistent usage, has moulded the life and regulated the dealings of a particular class of the community, it becomes a custom. Such a custom deserves to be recognised and enforced by the Courts unless it is injurious to public interests or is in conflict with any express law of the ruling power. Hence, where a special usage of succession was set up, the High Court of Madrs said: "what the law requires before an alleged custom can receive the recognition of the Court, and so acquire legal force, is satisfactory proof of usage, so long and invariably acted upon in practice, as to show that it has, by common consent, been submitted to as the established governing rule of the particular family, class, or district of country; and the course of practice upon which the custom rests must not be left in doubt, but be proved with certainty."—(Sivanananja *v.* Muttre Ramalinga, 3 Mad. H. C., 75, 77; affirmed on appeal, Subrominya Ramlaksmi *v.* Sivanutha, 14 Moor's I. A., 570; 12 B. L. R., 396; 17 W. R., 553.) This decision was affirmed on appeal, and the Judicial Committee observed (14 Moor's I. A., 585): "Their Lordships are fully sensible of the importance and justice of giving effect to long-established usages existing in particular districts and families in India, but it is of the essence of special usages, modifying

Particular usages of trade.

* Woodf. L. & T., 8th ed., 477-8; Dalby *v.* Hirst, 1 B. & B., 224, where the question was raised at Nisi Prius

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the ordinary law of succession, that they should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends." Accordingly the Madras High Court, when directing an enquiry as to an alleged custom in the South of India, laid it down: "I. The evidence must be such as to prove the uniformity and continuity of the usage, and the conviction of those following it that they were acting in accordance with law, and this conviction must be inferred from the evidence. II. Evidence of acts of the kind; acquiescence in those acts, decisions of Courts or even of panchayets, upholding such acts; the statements of experienced and competent persons of their belief that such acts were legal and valid will all be admissible; but it is obvious that although admissible, evidence of this latter kind will be of little weight if unsupported by actual examples of the usage asserted."—(Gopalayyan *v.* Raghupatiyyan, 7 Mad. H. C., 250, 254. See also *per* Markby, J., Hianath *v.* Baburam, 9 B. L. R., 294; 17 W. R., 316; Collector of Madura *v.* Muttre Ramalinga, 12 Moore's I. A., 436; 10 W. R., (P. C.), 17; 1 B. L. R., (P. C.), 1; Hara Prosad *v.* Sheo Doyal, 3 I. A., 285; 26 W. R., 55.) Finally the custom set up must be definite, so that its application in any given instance may be clear and certain and reasonable—(Luchman *v.* Akbar, I. L. R., 1 All., 440; Lala *v.* Hiar, I. L. R., 2 All., 49.) Broom has dealt with custom in his Commentaries on the Common Law, 3rd edition, pages 7-20. He has divided custom first into two classes, as quoted above, *viz.*, general and particular or local custom, and then he has referred to customs of the country and particular usages of trade The Bengal Tenancy Act does not define what a custom or usage is. In the opinions we have quoted above of their Lordships of the Privy Council with regard to custom and usage, they seem to have been used by their Lordships as convertible terms, and in every case antiquity, continuedness, uniformity and certainty were insisted upon as tests regarding the validity of custom or usage. The English authorities we have cited show that seven essential conditions are thought necessary by English Jurists to prove the validity of a particular or local custom or usage, and the terms "custom" and "usage" are used as convertible terms. It is only with regard to "customs of country," a misnomer, that it has been held that they need not have existed immemorially, but even they should be "reasonable and sufficiently definite and certain." In the ordinary use of the words, "usage" seems to be a wider term than "custom." Webster for instance, says: "These words (custom and usage) agree in expressing the idea of a habitual practice; but a custom is not necessarily a usage. A custom may belong to many or to a single individual. A usage properly belongs to the great body of a people Hence we speak of usage, not of custom, as the law of language Again, a custom is merely that which has been often repeated so as to become in a good degree established. Usage must be both often repeated, and of long standing. Hence we speak of a new custom, but not of a new usage." Thus also the "customs of society" is not so strong an expression as the "usages of society." "Custom, a greater power than nature, seldom fails to make

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them worship '! (Locke.) "Of things once received and confirmed by use, long usage is a law sufficient." (Hooker.) "Custom or usage differeth from use as the cause from the effect, in that custom or usage is by use and continuance established into a law." (Raleigh.) In ordinary phraseology, therefore, usage seems to be a stronger and wider term than custom. Section 183 of the Bengal Tenancy Act declares that nothing in the Act "shall affect any custom, usage or customary right not inconsistent with or not expressly or by implications modified or abolished by its provisions." Upon a careful reading of this section it does not appear to me that the Legislature intended to make any distinction between custom and usage in this section. An attempt, however, has been made to draw a distinction between a custom and a usage upon the language of this section by the learned Judges of the High Court in the case of Palakdhari Rai *v.* Manners and others, I. L. R., 23 Cal., 179. They observe at page 182: "Although no reference was expressly made in s. 183 itself in regard to the validity of a transfer in accordance with usage which may be established by evidence of a less substantial character than that required to prove a custom, illustration (1) to s. 183 seems to show that this was contemplated by the Legislature." That illustration is as follows: "A usage under which a raiyat is entitled to sell his holding without the consent of his landlord is not inconsistent with and is not expressly or by necessary implication modified or abolished by the provisions of this Act." With due deference to the learned Judges who draw the distinction, I regret that I do not see how the section makes a distinction detween custom and usage. If in the illustration quoted, we read 'custom' instead of 'usage,' it would read as well and would hold good. In sub-s. (3), cl. (*d*) of s. 178 of the Bengal Tenancy Act, we find it provided that nothing in any contract between a landlord and a tenant, after the passing of this Act shall take away the right of a raiyat to transfer or bequeath his holding in accordance with *local usage*. The expression "local usage" is convertible with "local custom," as We read in the books of the English jurists, and there is nothing in the section itself to show that a different thing was meant. In the case of Dalgeish *v.* Guzzaffar Hossain, I. L. R., 23 Cal., 427, the learned Judges observed: "The word *usage* at any rate would include what people are now or recently in the habit of doing in a particular place. It may be that this particular habit is only of a very recent origin, or it may be one which has existed for a long time. If it be one *regularly* and *ordinarily* practised by the inhabitants of the place where the tenure exists, there would be *usage* within the meaning of section 183." I regret that I have been unable to find any authority for the proposition that usage would include what the people are now or recently in the habit of doing in a particular place. The ordinary meaning of usage, as we have already seen, is that it must be ancient, and we have shown by quotations from English jurists as well as from their Lordships the Privy Council Judges that they have used the terms custom and usage as convertible, and they have laid down that they should be ancient, invariable and certain. It will also appear clear that what the learned Judges in both these decisions meant was that *usage* as used in the

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Bengal Tenancy Act was what English jurists call "customs of the country," and that expression occurs in the judgment of Justice Sir Henry Prinsep when speaking of usage. With all deference to the learned Judges, I submit that there is no authority or valid reason for thinking so. As, however, they have held it to be so, their decision is binding. But even in cases of the customs of the country, the English jurists have held that 'a custom of the country' in order to be good, must be reasonable and sufficiently definite and certain. I do not think that the learned Judges who decided the two cases reported in Indian Law Reports, Vol. 23, meant to depart from this rule. Mr. Justice Trevelyan indeed observed that "it must be one *regularly* or *ordinarily* practised by the inhabitants of the place where the tenure exists. That to my mind is to say that the usage must be definite and certain. Justice Sir Henry Prinsep no doubt quoted the observations of their Lordships of the Privy Council in the case of Jugobandhu Ghose *v.* Manik Chand, 7 Moore's I. A., 263, but those observations were made with reference to mercantile usage, and they have no application whatever to customs of the country. The learned Judge himself saw it and guarded his observations carefully. He quoted the following observations of their Lordships of the Privy Council: "It remains now to consider the other ground upon which the plaintiff relies upon the evidence of mercantile usage. To support such a ground there needs not either the antiquity, the uniformity, or the notoriety of custom, which in respect of all these becomes local law. The usage may be still in the course of growth; it may require evidence for its support in each case; but in the result it is enough if it appears to be so well known and acquiesced in that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract." He then observes: "In applying this case, it must be borne in mind that it relates to a usage in dealing in a particular class of mercantile transactions and contracts made in the course of such business. Consequently in introducing these principles in the present case, which does not relate to contracts entered into between the parties to the litigation but affects a third party, the landlord, it would be necessary either to prove the existence of the usage on his estate, or that it is so prevalent in the neighbour-hood that it can be reasonably presumed to exist on that estate. It may be that the usage may have gradually sprung up all round an estate and yet never have been introduced on it or been recognised on it, and therefore in considering the evidence it is of much importance that this should be taken into consideration in connection with the conduct of the landlords in regard to any such transfers as may have taken place without his consent." It therefore appears to me to be pretty clear that the learned Judges in both these decisions never meant to depart from the rule that a usage should be reasonable and sufficientlly definite and certain. See I. L. R., Cal., 925. A usage which has not been peaceably enjoyed and acquiesced in and is subject to contention and dispute is no usage at all. It must also be uniform, because if there are instances to the contrary in the same locality or in the same class of people, there are several acts or habits but no usage. It should also be compulsory. In this connection I have to draw attention to illus-

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tration (1) of s. 183 of the Bengal Tenancy Act. The usage referred to in that illustration is a "usage under which the raiyat is entitled to sell his holding *without the consent* of the *landlord*, and Justice Sir Henry Prinsep observes page 185 in the decision of Palakdhari Rai *v.* Manners and others, I. L. R, 23 Cal., 179: "The Subordinate Judge next refers to the fact that some of the landlords (*maliks*) have purchased without the consent of their other co-sharers, and from this he finds a 'usage well-known in the locality and acquiesced in by the other *maliks*'. But this is not a legitimate conclusion. Such a purchase stands on an entirely different footing from a purchase by a stranger: for it is made at least with the consent of the purchasing landlord, and it could not be properly regarded as a recognition of a usage to the purchase without the consent of the landlord. The custom or usage that the defendants have therefore to prove is, that transfers have been made and have been operative without the consent of the landlord, and if there be instances in which the transferees have obtained the consent of the landlord or have pacified them by *nazarana* or fresh settlement that would not prove the custom or usage in question." The Full Bench decision of Narendra Narain *v.* Ishân Chandra, 13 B. L. R., 274, settled it once for all that the statutory right to occupancy was a personal right and not transferable as such. The learned Chief Justice is delivering that judgment, however, observed: "The question, as I have answered, is solely upon the Act, and independent of the existence of any custom." The view of the Full Bench was more fully developed by Mr. Justice Phear in the case of Bibi Sohodra *v.* Smith, 20 W. R., 139; "As the authorities stand this question seems to be one of some nicety, and in considering it there is need to bear in mind that the relations between zemindar and raiyat are not generally the same as those between English landlord and tenant. No doubt the zemindar has been made by legislative enactment the propietor of the land which forms his zemindari, and as regards his *khamar*, *neej-jote*, or *seer* land, it may be taken that the cultivator of the soil has generally no other rights than those which he obtains as a tenant by contract with the zemindar: but with regard to the raiyati lands which constitute the bulk of his zemindary, it is much otherwise. There, while the zemindar is still the proprietor of the land, the raiyats of the village, as the combined effect of custom and legislation, have in most, if not in all cases, some right to cultivate the raiyati land of the village, which is altogether independant of the zemindar and which, in the case of a raiyat having a right of occupancy, is a right to occupy and use the soil, quite irrespective of any assent or permission on the part of the zemindar. This right, resting upon legislation and custom alone, is not derived from the general proprietary right given to the zemindar by the Legislature, but is, as I understand, in derogation, and has the effect of cutting down and qualifying that right. I may say that in my conception of the matter the relation between the zemindar's right and the occupancy-raiyat's right is pretty much the same as that which obtains between the right of ownership of land in England, and the servitude or easement which is termed *profit a prendre*, although I need hardly say the raiyat's interest is greatly more extensive than a *profit a prendre*. It appears to me that the raiyat's is the dominant, and the zemindar's the servient right. Whatever the raiyat

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has, the zemindar has all the rest which is necessary to complete ownership of the land. The zemindar's right amounts to the complete ownership of the land subject to the occupancy-raiyat's right and the right of the village, if any, to the occupation and cultivation of the soil, to whatever extent these rights may in any given case reach. When these rights are ascertained there must remain to the zemindar all rights and privileges of ownership which are not inconsistent with or obstructive of them. And amongst other rights, it seems to me clear that he must have such a right as will enable him to keep the possession of the soil in those persons who are entitled to it, and to prevent it from being invaded by those who are not entitled to it. In this case too a custom was alleged sanctioning the transferability of the occupancy-right, but the learned Judge held that the custom must be a custom that sales are effected in spite of the landlord, and proofs of instances of sale must be such that the sales took place without the consent of the zemindar and still held good. In dealing with the evidence in that case, the learned Judge observed: 'The Judge says that he arrives at the conclusion that the transfers from the raiyats to the defendant upon which the defendant relies are proved: and also that these raiyats had tenures which they were capable of transferring. But it appears very clear that in dealing with the evidence, the lower appellate Court very seriously misapprehended the force of a considerable portion of it. We refer to the evidence of sales held in execution of decrees, the evidence consisting partly of parol testimony, and partly we believe of certificates of sales. But in all these instances of sales, so far as they have been brought to our notice, the sales were sales in execution effected at the instance of the zemindar himself; and consequently they could not be evidence of the right on the part of the raiyat to transfer without the assent of the zemindar."—(See also Bodhe Sing *v.* Murat Sing, 20 W. R., 478.) It should be remembered that the same view has been expressed by Justice Sir Henry Prinsep in the recent case of Palakdhari Rai cited above. It follows that illustration (1) of s. 183 of the Bengal Tenancy Act requires that the usage which should be given effect to is "a usage under which the raiyat is entitled to sell his holding without the consent of the landlord," and Justices Phear and Prinsep have both ruled that the evidence required to prove such a usage should be directed to prove instances of sale that have been effective without the consent of the landlord or in spite of him.

The tendency of the recent decisions seems to have veered round. In Dina Nath *v.* Bepin Chandra, C. W. N., 181 the High Court seems to have thought that, in dealing with the question of local usage relating to transferability, it was material to find whether such usage was in existence at the time of the creation of the tenure. In Ramhari *v.* Jubbur Ali; 6 C. W. N. 861, although the lower Courts had distinctly found the usage, the learned Judges considered that "the transfers could not by themselves establish the usage," and that, in order to prove usage, it was necessary to adduce evidence of purchases or transfers to persons other than the landlord to which "no successful objection was made by the landlord." In holding this, the High Court enlarged the *dictum* in the earliar case of Dalgush *v.* Guzuffar Hussain, 3 C. W. N. 21.

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In Jagan Prasad *v.* Posan Sahu, 8 C. W. N., 172 it has been held that the essence of a usage of transferability is that transfers made to the knowledge, but without the consent, of the landlord are valid and must be recognised by him; also, that, where the usage of transferability of occupancy-holdings is found to have been growing up in *pattis* other than that of the landlord, he can retard the growth of the usage in this *patti* by refusing to acknowledge the validity of transfers therein. In Radha Kishore Manikya *v.* Ananda Pria 8 C. W. N. 235, the facts found were that, in a certain locality, upon transfer of a non-transferable holding, the landlord does not recognise the transferee as tenant, but all the same he received rent from the transferee, granting a receipt, in which the original holder's name is entered as tenant, and in which the transferee's name is entered as a person through whom the payment is made; and that, when the transferee does not personally pay the rent, but sends it by an agent, the name of this agent is also entered as the person by whose hand the payment is made; also that until the transferee pays the *nazar*, the original holder remains recorded in the landlord's books as tenant. It was *held* that, upon these facts, it might be found that a *rayat* is entitled to sell his holding without reference to the landlord, provided only that the purchaser pays to the landlord a customary fee; also, that the finding that tenants do transfer their rights of occupancy without the landlord's consent does not in itself establish a usage in this respect, so as to affect the right of the landlords to accept or refuse to consent to such transfer; also, that the finding that payment of a *nazar* was requisite to validate such transfer would imply that the landlord's consent was necessary; and finally, that, the *nazar* not having been paid by the transferee in the particular case, the landlord was entitled to a decree for ejectment. Where it was found that there was a custom to the effect that the transfer of occupancy rights was not valid except on payment of ordinary fees to the landlord *held* that the transferee not having done so the transfer was invalid. Sibo Sundari Ghose *v.* Raj Mohun Guha 8 C. W. N. 214.

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CHAPTER XVI.

LIMITATION.

Limitation on suits, appeals and applications in Schedule III.

184. (1) The suits, appeals, and applications specified in Schedule III annexed to this Act shall be instituted and made within the time prescribed in that schedule for them respectively; and every such suit or appeal instituted, and application made, after the period of limitation so prescribed, shall be dismissed, although limitation has not ben pleaded.

(2) Nothing in this section shall revive the right to institute any suit or appeal or make any application which would have been barred by limitation if it had been instituted or made immediately before the commencement of this Act.

Sub-section (1):—This section is controlled by s. 185, and therefore these provisions are complemented by the definitions and provisions of the Limitation Act.

Suit.

The word "suit" therefore has been evidently used in the sense in which it has been defined in Act XV of 1877, *viz.*, that it "does not include an appeal or an application." So in Act IX of 1871: "We think that the word 'suits' in the Act of 1871 was not intended to include 'application.' In the Act of 1859 the word might have had a more extended meaning, but in the Act of 1871 a distinction seems to have been carefully drawn between 'suits,' 'appeals,' and 'applications,' each of these subjects being separately dealt with, and in different divisions of the schedule."—(Dhunessur *v.* Gridur Sahay, I. L. R., 2 Cal., 336; see 9 W. R., 492; I. L. R., 1 All., 97.) But in Mungal Pershed *v.* Grija Kant, I. L. R., 8 Cal., P. C., 51, an application for execution of decree has been held to be an application in the suit in which the decree has been obtained. Therefore a suit would include applications for execution; so in Biharilal *v.* Goberdhunlall, I. L. R., 9 Cal., 446; see Keratansi Kalanjie, I. L. R., 2 Bom., 148; I. L. R., 10 Cal., 748. Act XV operates from the date on which it came into force as regards all applications made under it. (Behari Lall *v.* Goburdhan Lall, I. L. R., 9 Cal., 446, dissented from.) An application for execution was made on the 2nd March 1872. In the execution-proceedings, certain properties were attached and a sale-proclamation was issued. A claim to a portion of the properties was then preferred by third parties allowed on the 17th of June 1872. The decree-holder failed to take necessary measures to bring the remainder

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of the property to sale, and the case was struck off on the 4th of July 1872. A subsequent application for execution was made on the 14th June 1875. It was held that the subsequent application was not barred by the provisions of s. 20, Act XIV of 1859. *Bonâ fide* proceedings in resistance of a claim to attach properties are proceedings to enforce a decree within the meaning of s. 20 of Act XIV of 1859.—Becharam Dutta *v.* Abdul Waheb, I. L. R., 11 Cal., 55.

Shall be instituted:—*Explanation* of s. 4 of Act XV of 1877 which applies to this Act also by sub-s. (2) of s. 185, *post*, runs thus; "A suit is instituted, in ordinary cases, when the plaint is presented to the proper officer; in the case of a pauper, when his application for leave to sue as a pauper is filed; and in the case of a claim against a company which is being wound by the Court, when the claimant first sends in his claim to the official liquidator." But this rule is modified by s. 22 of Act XV of 1877, so far as it concerns *new plaintiffs or defendants* added after the institution of the suit, which also shows what is meant by the words 'ordinary cases' in the *Explanation* just referred to. Delay in the appointment of a *gardian ad lintem* for a minor does not affect the date of institution.—I. L. R., 4 All., 37. When the plaint was really presented on the 29th July, it would not matter if the endorsement on the plaint stated that it was presented on the 31st July, or that it was *not accepted* until the later date—Young *v.* MacCorkindale 19 W. R., 159; see also 5 W. R., 207; 6 W. R., 39; 7 W. R., 157; 23 W. R., 447; I. L. R., 1 All., 260.) The date of institution is the date of the first presentation of the plaint—(I. L. R., 4 All., 37.) If the plaint is returned for insufficiency of stamp, or for any amendment and then it is presented again within the time allowed or within a reasonable time, the date of the *first* presentation is the date of institution. The same remark applies to appeals.—(See I. L. R., 2 All., 832, 875; I. L. R., 1 All., 260; 23 W. R., 447. See 7 W. R., 157, 241; 1 Mad. H. C. R., 427.) It has been held by the Punjab Chief Court that an appeal is not presented within the meaning of the first para. of s. 4 if it is not accompanied by the copies of decrees and judgment required by s. 541 of the Civil Procedure Code.—(See Rivaz, 16.) Order admitting an appeal after time made *ex parte* by a single Judge of the High Court sitting to receive applications for the admission of appeals under a rule of the High Court made in pursuance of 24 and 25 Vict., c. 166, s. 13, and Letters Patent of the Court, s. 27, is liable to be set aside at the hearing of the appeal by the Division Court, on the ground that the reasons for admitting the appeal were erroneous or inadequate.—(2 B. L. R., 184; 4 B. L. R., 84; I. L. R., 1 All., 34.) This reverses the decision in 8 W. R., 141. In 10 B. L. R., 155, it was held that the order was open to the review. Under s. 48 of the Civil Procedure Code, the plaint must be presented to the Court or *such officer as it appoints in this behalf* (see 6 Bom., 254.) A plaint may not be presented at the private residence of the Judge or officer.—(7 N.-W. P., 5; *contra*, South. S. C. Cf. Ref., 36.)

Within the time prescribed in that Schedule.

The word 'prescribed' has a technical meaning in the Act (*vide* cl. 15 of s. 3, *ante*.) In the section, however, that technical meaning cannot obtain. The word 'prescribed' here means prescribed by the Act as the context clearly shows.

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Shall be dismissed although limitation has not been pleaded.

This penalty must be enforced even if the defendant is willing to confess judgment.—Deb Narain *v.* Islam, 13 C. L. R., 153, 155; Jaimal Singh *v.* Bhaga, Rivaz, 15, The point of limitation is one which, whether it be taken by the defendant or not, the Court is *bound* to entertain.—Ramey *v.* Brougton, I. L. R., 10 Cal., 652, 658; 2 Bom., H. C. R., 162; 2 Wym. Rep., 24. Instead of dismissing the suit, the Court may allow the plaintiff to withdraw his suit in order that he may proceed against the defendant in a foreign Court where the law of limitation may not be the same as that of British India.—(I. L. R., 6 Bom., 103, 107.) The munsiff dismissed a suit as barred by limitation; the Judge on appeal set aside the munsiff's decision and remanded the suit for investigation on the merits. The munsiff then gave the plaintiff a decree in full; the Judge on appeal disallowed a part of the claim; the plaintiff appealed to the High Court. The defendant preferred a cross-objection to the Judge's finding of fact as to the part decreed. The High Court is bound to consider the question of limitation, although it is not open to the respondents to take this objection themselves. —Ambalu *v.* Nadu Vakat, I. L. R., 6 Mad., 325. Compare 13 W. R., (F. B.), 44; 13 W. R., 52; 1 Agra, 248; 3 Bom., H. C. R., 164; 1 B. L. R., 25; 7 W. R., 67; 4 Moo., I. A., 509; 14 W. R., 370.) If the question of limitation has been decided (directly or indirectly between the parties, it cannot be raised again in a subsequent stage of the same case.—Munga Pershad *v.* Grija Kant, 11 C. L. R., P. C., 113; also 11 C. L. R., 145.) Remanding a case on appeal is indirectly or constructively determining that the suit is not barred by limitation.—Morubin *v.* Gopalbin, I. L. R., 2 Bom., 120, 131. Judgment-debtor cannot raise the plea of limitation in respect of execution-proceedings under which his property has *already* been sold and purchased by a third party.—(I. L. R., 6 Mad., 237; I. L. R., 10 Cal., 220.) Where the defendant successfully pleads limitation, the suit must be dismissed *with costs*, even if the plea is used for the purpose of refusing to perform admitted obligations.—(Banning, 283; L. R., 7 Eq., 75.) Where however, the defendant does *not plead* limitation at the first stage of the case, the Court may refuse to award costs to him.—(I. L. R., 6 Mad., 178.) Illustration (*b*) of s. 4 of Act XV overrules Bharat *v.* Issur Chunder, 8 W. R., 141. It runs thus: "An appeal presented after the prescribed period is admitted and registered. The appeal shall nevertheless be dismissed."

Sub-section (2).—The Bengal Act VIII of 1869 made a special provision of limitation for applications for review. The present Act does not reproduce it. Under the old Act an application for review, if not filed within 30 days of the judgment, would have been barred by the old law. Under the new Act, the Indian Limitation Act would apply to a case like this, and the applicant will get three months' time for filing his review. Suppose at the date of the commencement of the Act 30 days are over, under this sub-section the applicant is barred; but suppose at the date of the commencement of the Act, 29 days have only expired, this sub-section will not apply, and it may be argued that the applicant will get three months' time. But not so; we must read this section with s. 6 of the General Clauses Act, and the old law will

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govern a case like this. Compare Sub-s. (4) of s. 2. Schedule III prescribes one period of limitation for all suits for arrears of rent brought under the provisions of the Act, whether the rent is payable under a lease or not, and whether the lease is registered or not.—Makenzie *v.* Haji Syad Mahomed Ali Khan, I.L.R., 19 Cal., 1. See also Iswari Pershad Naraia Sahi *v.* Crowdy, I.L.R., 17 Cal, 469. It is equally applicable to suits for arrears of rent of *patni taluks*.—Burnamayi Dasi *v.* Burma Mayi choudhurani, I.L.R. 23 Cal., 191. But cases which do not come within the purview of the Schedule are governed, as to limitation, by Act XV of 1877 [see section 185, sub-section (2) *post*.]

185. (1) Sections 7, 8, and 9 of the Indian Limitation Act, shall not apply to the suits and applications mentioned in the last foregoing section.

Portions of the Indian Limitation Act not applicable to such suits, &c.

(2) Subject to the provisions of this Chapter, the provisions of the Indian Limitation Act, 1877, shall apply to all suits, appeals, and applications mentioned in the last foregoing section.

Sub-section (1).—Section 7 provides that, if a person is a minor, insane, or an idiot at the time from which the period of limitation is to be reckoned, he may institute a suit or make his application within the same period after the disability has ceased, as would otherwise have been allowed from the time prescribed by the law. Compare Dinanath *v.* Roghoonath, 5 W. R. Act X 41; Girja Nath *v.* Patani Bibi, I. L. R. 17 Cal. 263. Section 8 provides that when one of several joint creditors or claimants is under such legal disability and a discharge can be given without his concurrence, time will run against them all: but if such discharge cannot be given, time will not run against any of them until one of them becomes capable of giving such discharge. Section 9 provides that when once time has begun to run, no subsequent disability or inability to sue stops it.

Sub-section (2).—Subject to the provisions of this Chapter.—So s. 6 of Act XV of 1877 provides: "When, by any special or local law now or hereafter in force in British India, a period of limitation is specially prescribed for any suit, appeal, or application, nothing herein contained shall affect or alter the period so prescribed;" see s. 6 of Act IX of 1871 and s. 3 of Act XIV of 1859. These rules are founded upon the maxim *generalia specialibus non derogant*,—a general later Act does not repeal, control or alter an earlier special or local one by mere *implication*. Such an Act is presumed to have only general cases in view, and not particular cases which have already been provided for (Maxwell, 157.) "The reason is that the Legislature, having had its attention directed to a special subject, and observed all the circumstances of the case and provided from them, does not intend, by a general enactment afterwards, to derogate from its own act, where it makes no special mention of its intention to do so."—Unnoda Prosad *v.* Kristo Kumar, 19 W. R., 5 P. C.; the Collector *v.* Punriar, 1 Mad., 19, 110. It was accordingly held that the general law of limitation

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(Act XIV of 1859), in the absence of any express *words, or necessary implication*, did not repeal or affect the limitation clauses of the Bengal Rent Law (Act X of 1859).—Unnoda Prosad *v.* Kristo Kumar, 19 W. R., 5, P. C.; Paulson *v.* Modhu Sudan, 2 W. R., Act X, 21, F. B. Section 6 of Act IX of 1871 saved special and local laws, "now or hereafter to be in force, so that whether the general Act was *later* or not, its provisions could not be imported into any local or special law. And after the passing of that Act it was held that the provisions as to disability contained in that or any other Act could not apply to a suit under a special Act.—Thakur Kupitnath *v.* The Government, 13 B. L. R., 445; 22 W. R., 17. Similarly the provision in s. 5 of Act IX as regards the period of limitation expiring on a day when the Court is closed, has been considered to be inapplicable to suits for arrears of rent under Act VIII of 1869 B. C.—Paran Chunder *v.* Mutty Lall, I. L. R., 4 Cal., 50; 2 C. L. R., 543.) Act XV of 1877, however, has altered the law. It has been held by the Calcutta High Court that the language of s. 6, Act XV of 1877, has introduced a change in the law. Under Act IX of 1871 the rule was that local and special *laws* of limitation were not to be affected by the general law, but under Act XV of 1877, the rule is that the periods of limitation prescribed by special or local laws shall not be altered or affected by the general law. This raises an inference that the Legislature intended *that the general provisions and exceptions* contained in Act XV of 1877 should be applicable to suits, appeals, or applications governed by special or local laws of limitation. Accordingly the general provision of s. 5, Act XV of 1877 (as regards the period of limitation expiring on a day when the Court is closed), has been applied to suits under Act VIII of 1869 B. C.—(Gopal Chand *v.* Kristo Chunder, I. L. R., 5 Cal., 314; Khosal *v.* Gunesh Dutt, I. L. R., 7 Cal., 790.) Similarly, the general provisions of s. 12, Act XV (as to exclusion of time occupied in obtaining copies of decrees &c.), and sf s. 19, Act XV (as to acknowledgment of liabilities) have been considered applicable to applications and suits under Act VIII of 1869 B. C.—(Biharilal *v.* Mungalanath I. L. R., 5 Cal., 110.) In the report of this case a similar ruling of Sir Richard Garth is referred to. See Parbatinath *v.* Tejmoey, I. L. R., 5 Cal., 303. But as these general provisions and exceptions modify the periods of limitations prescribed by local and special Acts, they may be said to 'affect,' if not 'alter,' those periods. And although the corresponding section of Act XIV of 1859 (s. 3) referred to the *periods* of limitation only, the general provisions of that Act were held by the Privy Council to be inapplicable to suits for which a shorter period of limitation had been prescribed by a special Act.—Unnoda Persaud *v.* Kristo Koomar, 19 W. R., 5 P. C.; Mahomed Bahadoor *v.* The Collector, 21 W. R., 381; P. C. See also Hariram *v.* Vishun, 10 Bom. 204. Besides, under the well-established rule of construction to which we have referred, a mere *inference*, unless it is a necessary one, is not sufficient to rebut the presumption that the Legislature does not intend by a general enactment to interfere with a special one.—19 W. R., 5, 6, 7, P. C. On the other hand, it should be remembered that Act XV expressly provides (see s. 1) that ss. 2 to 25 shall not apply to suits under two *particular* special laws, *viz.*, Act IV of 1869 and Mad. Reg.

The provisions of the Indian Limitation Act 1877, shall apply to all suits, &c.

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VI of 1831. From this it would seem that the Legislature intended that to suits under other special laws, those sections may, as far as possible, apply. Hence in Ram Raw *v.* Venkatisa, I. L. R., 5 Mad., 171, F. B., the Judges of the Madras High Court were of opinion that s. 19 Act XV of 1877, was applicable to summary applications under special and local laws, such as the Acts regulating the rights of landlord and tenant in the North-Western Provinces and in Bengal. *Query*—If the general provisions of Act XV are applicable to suits and applications under all special and local laws, whey has the Legislature *expressly* extended those provisions to suits under Act XVIII of 1881 (see s. 23, Act XVIII of 1881, the Central Provinces Land Revenue Act). The general provisions of the Limitation Act are contained in ss. 5—25. For decisions under those sections, the reader is referred to the author's Indian Limitation Act. Even under the old law it was held that the provisions of s. 5 of the Limitation Act are applicable to suits under Act VIII of 1869 B. C.—Behari Lall Mukerji *v.* Mungola Nath Mookerjee I. L. R., 5 Cal., 110; Golap Chand Nowluckha *v.* Kristo Chunder Dass Biswas I. L. R., 5 Cal., 314; Khoshe Lall Mahton *v.* Gunesh Dutt L. R., 7 Cal., 690. Compare Khetter Mohun Chuckerbutty *v.* Dinabasshy Shaha I. L. R., 10 Cal., 265; Nagendra Nath Mullick *v.* Mathura Mahun Parhi I. L. R., 18 Cal., 368. In Nagendranath Mullik *v.* Mahura Mohun Persjhi, I. L. R., 18 Cal., 368, F. B., the Calcutta High Court held that the provisions of section 14 of the Limitation Act were not applicable to suits for arrears of rent under Act X of 1859, but sub-section (2) is quite explicit and this ruling does not apply to present Act.

Is the claim for rent in abeyance during litigation:—When there has been litigation between two persons, and in the result it has been found that they stand to each other in the relation of landlord and tenant, and stood in that relation while the litigation was proceeding, but, until their mutual rights were finally determined, the landlord was unable to sue the tenant for rent, the period of limitation for a suit for the rent in question should be counted from the termination of such litigation.—Rent Commission's Report, para 162; Ranee Burnamoyee *v.* Shoshee Mukhee Burmonia, 12 Moo. I. A. 244; 11 W. R., P. C. 5; 2 B. L. R., P. C. 10. See also Ishan Chandra Ray *v.* Khaja Assanulla 8 B. L. R., 537 note; 16 W. R. 79; Dindayal Paramanik Radha Kishori Debi 8 B. L. R., 536; 17 W. R., 415; Mohesh Chunder Chakladar *v.* Gungamonee Dasee 18 W. R., 59, and Dhunput Singh *v.* Saraswati Misrain I. L. R., 19 Cal., 267. This rule is, however, not applicable where, although the landlord has denied the contnuance of the relation of landlord and tenant, and attempted to put an end to that relation, the tenant was, nevertheless, not dispossessed, and there was in consequence nothing to prevent the landlord from suing for and recovering his rent. See Watson & Co. *v.* Dhanendra Chandra Mukhurji, I. L. R., 3 Cal., 6; Brajendra Kumar Rai *v.* Rakhal Chandra Rai, *ib.*, 791; Haro Prasad Rai *v.* Gopal Das Datta, *ib.*, 817; Haronath Rai *v.* Golak Nath, 19 W.R., 18; Barada Kanta Rai *v.* Chundra Kumar Rai, 23 W.R., 280; Haro Prasad Rai, *v.* Gopal Das Datta, I. L. R., 9 Cal., 255; 12 C. L. R., 129; Sherriff *v.* Dinanath Mukherji, I. L. R., 12 Cal., 258; Haro Kumar Ghosh *v.* Kali Krishna Thakur, I. L, R., 17 Cal., 251; Barnomayi Dasi *v.* Bramamayi Chaudhurani, I. L. R., 23; Cal., 191; Mahomed Mazid *v.* Mahomed Ashan, I. L. R., 23 Cal., 205.

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CHAPTER XVII.

SUPPLEMENTAL.

Penalties.

Penalties for illegal interference with produce.

186. (1) If any person, otherwise than in accordance with this Act or some other enactment for the time being in force,—

(*a*) distrains or attempts to distrain the produce of a tenant's holding, or

(*b*) resists a distraint duly made under this Act, or forcibly or clandestinely removes any property duly distrained under this Act, or

(*c*) except with the authority or consent of the tenant prevents or attempts to prevent the reaping, gathering, storing, removing or otherwise dealing with any produce of a holding,

he shall be deemed to have committed criminal trespass within the meaning of the Indian Penal Code.

XLV of 1860.

(2) Any person who abets within the meaning of the Indian Penal Code the doing of any act mentioned in sub-section (1), shall be deemed to have abetted the commission of criminal trespass within the meaning of that Code.

XLV of 1860.

Sub-section (1):—The punishment under section 447 of the Indian Penal Code for these offences is imprisonment of either description for a term which may extend to three months, or fine which may extend to five hundred rupees, or both.

Sub-section (2):—See sections 109 and 116 of the Indian Penal Code.

Agents and representatives of landlords.

Power for landlord to act through agent.

187. (1) Any appearance, application or act, in, before or to any Court or authority, required, or authorised by this Act to be made or done by a landlord, may, unless the Court or authority otherwise directs,

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be made or done also by an agent empowered in this behalf by a written authority under the hand of the landlord.

(2) Every notice required by this Act to be served on, or given to, a landlord shall, if served on, or given to, an agent empowered as aforesaid to accept service of or receive the same on behalf of the landlord, be as effectual for the purposes of this Act as if it had been served on, or given to, the landlord in person.

(3) Every document required by this Act to be signed or certified by a landlord, except an instrument appointing or authorizing an agent, may be signed or certified by an agent of the landlord authorized in writing in that behalf.

Joint-landlords to act collectively or by common agent.

188. Where two or more persons are joint-landlords, anything which the landlord is under this Act required or authorized to do must be done either by both or all those persons acting together, or by an agent authorized to act on behalf of both or all of them.

Suits for arrears of rent by co-sharers:—Under the old law a co-sharer landlord could collect his share of the rent separately, and sue for it separately, when it had been arranged between the co-sharers and the tenants that the latter should pay each co-sharer his proportionate share of the entire rent. Such an arrangement might be evidenced either by direct proof, or by usage from which its existence might be presumed. In the absence of such an arrangement, a separate suit by a co-sharer for rent could not be maintained.—Ghan Mahomed *v.* Moran, I. L. R., 4 Cal., 96; 2 C. L. R., 370; Ramjai Singh *v.* Nagar Ghazi 5 W. R., Act X, 68; Ganga Narain Das *v.* Saroda Mohan Rai, 12 W. R., 30; 3 B. L. R., A. C., 230; Sri Misra *v.* Crowdy, 15 W. R., 243; Indramani Barmani *v.* Sarup Chandra Pal, 15 W. R., 395; 12 B. L. R., 291; note; Bhairab Mandal *v.* Gangaram Banurji, 17 W. R., 408; Haradhan Gossami *v.* Ram Nawaz Misra, 17 W. R., 414; Dinobandhu Chaudhri *v.* Dinonath Mukhurji, 19 W. R., 168; Lalan *v.* Hemraj Singh, 20 W. R., 76; Baikanto Kaibarta *v.* Sashi Mohan Pal, 22 W. R., 526; Brajo Kishor Bhattacharji *v.* Uma Sundari Debi, 23 W. R., 37; Dinobandhu Rai *v.* Uma Charan Chaudhri, 23 W. R., 53; Anu Mandal *v.* Kamaludin, 1 C. L. R., 248; Ahamuddin *v.* Girish Chandra Shamanto, I. L. R., 4 Cal., 350; Lutfulhak *v.* Gopichandra Mazumdar, I. L. R., 5 Cal., 941. But see contra, Amrit Chaudhri *v.* Haidar Ali, W. R., Sp. No., Act X, 63; Mahomed Singh *v.* Maghi Chaudhurain, 1 W. R., 253; Piari Mohan Singh *v.* Mirza Ghazi Mazumdar, 11 W. R., 270; S. C., 2 B. L. R., 337; Dinobandhu Rai *v.* Uma Charan Chaudhri, 23 W. R., 53. But without such an arrangement a co-sharer landlord could sue for his separate share of the rent, if he made all his co-sharers co-defendants, or he could ask the Court

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to make them co-defendants.—Harkishore Das *v.* Jugal Kishor Shaha, 16 W. R., 281; Salehunnissa Khatun *v.* Mohesh Chandra Rai, 17 W. R., 452; Durga Charan Sarmah *v.* Jampa Dasi, 21 W. R., 46; 12 B. L. R., 289; Mokhoda Sundari Dasi *v.* Karim, 23 W. R., 11; Kali Charan Singh v. Solano, 24 W. R., 267; Srinath Chandra Chaudhri *v.* Mohesh Chandra Bandopadhya, 1 C. L. R., 453; Jadu Das *v.* Sutherland, I. L. R., 4 Cal., 556; 3 C. L. R., 223; Ganga Narain Sarkar *v.* Srinath Banurji, I. L. R., 5 Cal., 915; Abhai Gobind Chaudhri *v.* Hari Charan Chaudhri, I. L. R., 8 Cal., 277: *contra*, Annoda Charan Rai *v.* Kali Kumar Rai, B. L. R., 4 Cal., 89; Manohar Das *v.* Manzur Ali, I. L. R., 5 All., 40. He was not bound to ask his co-sharers to join him as plaintiffs.—Tarini Kant Lahiri *v.* Nanda Kishor Patranavis, 12 C. L. R., 588. He might also claim the whole rent and ask the Court to make the other co-sharers plaintiffs with him—(Tara Chand Banurji *v.* Amir Mandal, 22 W. R., 394). In a subsequent case it was laid down that this was the proper course for him to pursue in such circumstances—Jadu Shat *v.* Kadambini Dasi, I. L. R., 7 Cal., 150. When a tenant had been accustomed to pay his rent jointly and was sued by one of the co-sharers, the other co-sharer landlords being made defendants, and the tenant pleaded that he had paid the rent to the co-defendants, who admitted the receipt of it, the suit was dismissed, it being held that the remedy of the co-sharer landlord was against the other co-sharers and not against the tenant. —Ahamuddin *v.* Grish Chunder, I. L. R., 4 Cal., 350. It has been held by the High Court that s. 188 makes no change in the previous law regarding the recovery of rent by a co-sharer landlord. In one of the earliest cases decided by the High Court, it was said "we can find nothing in the (Bengal Tenancy) Act which authorizes a landlord to bring a suit for recovery of arrears of rent. The terms of the section (188) should be strictly construed, for we cannot assume that the Legislature intended to alter the practice of our Courts as established by numerous decisions.—Premchand Nuskur *v.* Mokshodu Debi, I. L. R., 14 Cal., 201; see also Jugabundhu Patuck *v.* Jadu Ghose Alkushi, I. L. R., 15 Cal., 47; Umesh Chandra *v.* Nasir Mullik, I. L. R., 14 Cal., 203, ante. It was therefore held that, as there was nothing in the Act which authorised a landlord to bring a suit against a tenant for arrears of rent, one of several joint landlords is still competent to sue for the entire rent, making his co-sharers parties te the suit. But where a tenant had taken a lease from one of several joint landlords in respect of his own share of the holding, it was held that the landlord was entitled to sue for rent without joining his co-sharears.—Bihari Churan Sen *v.* Bhuth Nath Pramanik, 3 C. W. N., 214; see Panchanan Banurji *v.* Raj Krishna Guha, I. L. R., 19 Cal., 617. When a decree for the entire rent of a tenure is obtained by one of several co-sharers by making the other parties defendants and is executed by him alone, the decree has the same effect as if obtained by all the co-sharers, and sec. 188 has no application.—(Chandra Sikhar Patra *v.* Rani Manjhi, 3 C. W. N., 386). It is only when plaintiffs can show that those entitled as co-sharers to join with them refused to join, or have otherwise acted prejudecially to their interests, that they are entitled to sue al one and make their co-sharers defendants in the suit.—Dwarkanath Mittra *v.*

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Tara Prasanno Rai, I. L. R., 17 Cal., 160., Jibanti Nath Khan *v.* Gokul Chandra Chaudhuri, I. L. R., 19 Pal., 760; Sashi Sikharesswar Rai *v.* Giris Chandra Lahiri, 1 C. W. N., 659. But such a suit should not be dismissed merely on the ground that there is no evidence to show that the other co-sharers refused to join as plaintiffs :—Bissessar Rai Bhaudhri *v.* Braja Kant Rai, 1 C. W. N., 221). If co-sharers are unaware whether the share of the rent due to their other co-sharers has been paid or not, they are entitled to bring their suit in the alternative, asking for their share of the rent only in the first instance, but praying that, if any portion of the due to their co-sharers be unpaid, they may be allowed to amend their plaint and claim a decree for the entire rent.—(Prakash Lal *v.* Ekkauri Balgovind Sahai, I. L, R., 19 Cal., 735). In Piari Mohan Basu *v.* Nobin Chandra Rai (I. L. R., 26 Cal., 409; 3 C. W. N., 271), as the Court was of opinion that there was a conflict between the cases of Tarini Kant Lahiri v. Nanda Kishor Patronavis (12 C. L. R., 588), Dwarkanath Mittra *v.* Taro Frasanna Rai, (I. L. *R.*, 17 Cal., 160), Bisseswar Rai Chaudhri *v.* Braja Kanta Rai (1 C. W. N., 221), and Shashi Shikareswar Rai *v.* Grish Chandra Lahiri (1 C. W. N., 659) referred the following question for the decision of a Full Bench : "When two parties contract with a third party, can a suit by ont of them, making the other a co-defendant, be dismissed, because the plaintiff had not proved that the co-defendant had refused to join as plaintiff?" The Full Bench answered this question in the negative. When a number of landlords collect rent jointly, the fact that one of them alone has got his name registered under the Land Registration Act in respect of his share does not entitle him to recover his share of the rent separately.—Rampad Singh *v.* Ramdas Pandi, 1 C. W. N., ccxlv. Where and estate belonging to several owners was partitioned and each of them brought separate suit for arrears of rent against the tenant, it was held that the suit was maintainable, and that apportionment of the sum due might take place, all the parties interested having been made parties, and that section 188 did not bar the suit, as the section does not prescribe that the relation of joint landlord is to enure for ever.—Raj Narain Mittra *v.* Ekadari Bag, 4 C. W. N., 494.

Co-sharer's right to sue for enhancement or assessment of rent :—One co-sharer landlord cannot enhance the rent of his share, such an enhancement being inconsistent with the continuance of the lease of the entire tenure.—Ghani Mahomed *v.* Moran, I. L. R., 4 Cal., 96; 2 C. L. R., 370; see also Bhairab Maudal *v.* Gangaram Banurji, 17 W. R., 408; 12 B. L. R., 290, note; Haradhan Gossami *v.* Ram Nawaz Misra, 17 W. R., 414; Raj Chandra Mazumdar *v.* Rajaram Gop, 22 W. R., 385; Chuni Singh *v.* Hira Mahata, 9 C. L. R., 37; I. L. R., 7 Cal., 633; Kashi Kishor Rai *v.* Alip Mandal, I. L. R., 6 Cal., 149; Jogendro Chandra Ghosh *v.* Nabin Chandra Chattopadhya, I. L. R., 8 Cal., 353; 10 C. L. R., 331; Kali Chandra Singh *v.* Raj Kishor Bhadro, I. L. R., 11 Cal., 615; but see *contra* Dukhi Ram Sarkar *v.* Gouhar Mandal, 10 W. R., 307; Sarat Sundari Debi *v.* Anand Mohan Ghatak, I. L. R., 5 Cal., 273; 4 C. L. R., 448; Bidhu Bhushan Basu *v.* Kamaradin mandal, I. L. R., 9 Cal., 864; Rash Bihari Mukhurji *v.* Sakhi Sundari Dasi, I. L. R., 11 Cal., 644). He could not do so, even if he made all his

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co-sharers parties to the suit.—(Bharat Chandra Rai *v.* Kali Das De, I. L. R., 5 Cal., 574; 5 C. L. R., 545. See *contra,* Gopal *v.* Macnaghten. I. L. R., 7 Cal., 751). But he could issue a notice of enhancement provided the suit was brought by all the share-holders.—(Chuni Singh *v.* Hira Mahata, I. L. R., 7 Cal., 633; Bidhu Bhushan Basu *v.* Kamaradin Mandal, I. L. R., 9 Cal., 864). Under the provisions of this Act joint-landlords cannot enhance (ss. 6, 33, 43 and 48), the rent of their tenants except jointly or or by an agent authorized to act on behalf of all of them.—(Gopal Chandra Das *v.* Umesh Narain Chaudhri, I. L. R., 17 Cal., 695; Mahib Ali *v.* Amir Rai, I. L. R., 17 Cal., 540; Haladhar Shaha *v.* Rhidai Sundari, I. L. R., 19 Cal., 593; Baidya Nath De Sarkar *v.* Ilim, 2 C. W. N., 44; I. L. R., 25 Cal., 917). But contracts for enhanced rent executed before the passing of this Act do not come within the operation of this section.—Tejendro Narain Singh *v.* Bakai Singh, I. L. R., 22 Cal., 658). Co-sharer landlords who are joint-landlords cannot now sue separartely for additional rent for additional land found by measurement to be in a tenant's possession sec. 52 (*a*); Gopal Chandra Das *v.* Umesh Narain Chaudhri, I, L. R., 17 Cal., 695; Bindu Bashini Dasi *v.* Piari Mohun Basu, I. L. R., 20 Cal., 107). But where the tenant has agreed to allow one of several co-sharer landlords to deal with him as his own tenant without reference to the rights of other co-share landlords, the effect is to create a separate tenancy under such fractional co-sharer and the provisions of section 188 are inapplicable.—Panchanan Banurji *v.* Raj Kumar Guha, I. L. R., 19 Cal., 610. Compare on this point Baidyo Nath De Sarkar *v.* Ilim, 2 C. W. N., 44; I. L. R., 25 Cal.,917). So too, when a tenant executed a *kabulyat* agreeing to pay rent for a certain area at a certain rate, and further, agreeing to pay rent at the same rate for an additional area on its becoming fit for cultivation, it was held that a suit brought on the kabulyat by the co-sharer landlord in whose favour it had been executed, would lie. It was said that the suit was not one for enhancement or one for additional rent for excess land, and if the plaintiff was entitled, as he admittedly was, to realize his share of the rent separately, there was no reason why he should not be entitled to claim separately the rent that was payable, not upon a fresh adjustment of the rent inconsistent with a continuance of the old tenancy, but upon an ascertainment of the rent payable in accordance with the terms of the original letting.—Ram Chandra Chakravarti *v.* Giridhur Datta, I. L. R., 19 Cal., 755. This was as followed in Tejendro Narain Singh *v.* Bakai Singh, I. L. R., 22 Cal, 658; and Dintarini Dasi *v.* Broughton, (5 C. W. N. 225.) But this is not the case when the rent has to be ascertained and adjusted after measurement.—Baidya Nath De Sarkar *v.* Ilim, 2 C. W. N., 44; I. L. R., 25 Cal., 917. So, when the defendants took possession of certain lands by gradual encroachment, and the plaintiffs, being co-sharer landlords, sued for assessment of rent; it was held that the holding would be a new holding and the rent assessed a new rent, sec 52 would not apply and sec. 188 would be no bar to the suit. But if a co-sharer landlord sues for rent not merely of the additional land found in the possession of the tenant but in respect of the entire quantity of land found in his possession including the lands of his old holding,

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sec. 52 applies and s 188 bars the suit:—Abdul Hamid *v.* Mahini Saha, 4 C. W. N., 508.

Assessment of rent.

Where tenant after the creation of the holding encroached upon certain lands and one of the co-sharer landlords brought a suit for his share of the encroached lands and for assessment of rent, *held* that the encroachment should be regarded as a new holding and the rent that would be assessed would be a new rent and a suit for assessment of rent is not an act that is authorised by s. 188, and consequently ss. 52 and 188 would be no bar to such a suit:—Khondkar Abdul *v.* Mohini, 4 C. W. N., 508. Where a co-sharer landlord brought a suit against a *raiyat* for arrears of rent and for additional rent on the basis of a kabuliyat executed and the *raiyat*, in which the right of the plaintiff to certain lands admitted and his right to additional rent for lands found on measurement to be in excess of the area stated was also admitted and the right of the plaintiff and the liability of the defendant were distinctly set out as the basis of the agreement between the parties, without any reference to the right of any other co-sharer landlord, it was *held* that the suit was maintainable although the plaintiff's co-sharer was not made a party.—Gobind Chandra Pal *v.* Hhamidulla Bhina, 7 C. W. N., 970. Held further that section 188 would not affect the co-sharer landlord's right under the kabuliyat unless the right to make such an agreement were otherwise forbiddin by the Act, and that section 178, which is the only section dealing with the full action of landlords and tenants in the matter of contracts, does not refer to such a matter. Where a whole body of co-sharer landlords and their tenants have come to an arrangement by which rent is made payable to the co-sharers separately in proportion to their shares in the estate, it is not competent for one of the co-sharers, so long as such arrangement subsists, to bring a suit for the full rents of the tenure by making his co-sharers parties co-defendants in the suit.—Raja Promoda Nath Roy *v.* Raja Ramoni Kant Roy, 9 C. W. N., 34.

Cosharer's right to grant attachment of rent;—A fractional shareholder of a tenure has no right to grant abatement of rent in respect of a holding within the tenure independently of his co-sharer:—Syama Charan *v.* Saim Mollah, 1 C. W. N. 415. An abatement granted by a co-sharer independently of the other co-sharers would not be binding on the latter or on himself. Nor can a joint tenant sue separately for abatement or reduction of rent: he must make all the landlords and all the joint tenants parties to the suit.—Bhupendra Narain Dutt *v.* Ramon Krishna, I. L. R., 27 Cal. 417; 4 C. W. N., 107.

Co-sharer's right to eject a tenant:—A fractional shareholder cannot sue for ejectment of a tenureholder (s. 10), a raiyat at fixed rates (s. 18), an occupancy raiyat (s. 25), non-occupancy raiyat (s, 46) or an under-raiyat (s. 49). But a co-sharer landlord who is the managing member of a joint family may eject—Annanda Mohan Surma *v.* Basir, S. A. 1568 of 1886, dated (5th January 1887); and section 188 is no bar to a suit for ejectment by one of the co-sharer landlords when the suit is brought for ejectment under the contract law, on the ground of breach of the conditions of the lease by the tenant.—Hari Pria Dabi *v.* Ram Churan Myti, I. L. R., 19

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Cal., 541. Where three documents had been executed by the tenant, in favour of separate co-sharers on different dates, stipulating for the separate payment of each co-sharer's share of the rent, the three leases must be held to constitute separate tenancies, one of which could be avoided without affecting the others.—Harendranarain Singh Chowdhury *v.* Moran, I, L. R., 25 Cal., 40.

Miscellaneous powers of co-sharers or joint-landlords:—The term "joint landlords" must be taken as including all co-sharers under whom a tenant holds, whether such co-sharers collect their *quota* of rent from the tenants jointly or separately.—Haladhar Shaha *v.* Rhidoy Sundri, I. L. R., 19 Cal. 593; Prem Chand *v.* Mokshada, I. L. R., 14 Cal., 201; Gopal *v.* Umesh, I. L. R., 17 Cal., 695; Beni Madhub *v.* Joad Ali, I. L. R., 17 Cal., 390 (F. B.) It has been ruled by the High Court that a co-sharer landlord cannot apply under section 158 to have the particulars of a tenancy determined; and it was also said that it is extremely doubtful whether a co-sharer can measure land under section 90.—Mohib Ali *v.* Amur Rai, I. L. R., 17 Cal., 538. But when a zemindar has granted a *mourasi* tenure and the *mourasidar* has granted a *dur-mourasi* tenure to a person who with the consent of the zemindar undertakes to pay direct to him the rent payable to the *mourasidar* and to pay to the *mourasidar* his profits, the zemindar and the *mourasidar* are not constituted joint landlords of the *dar-mourasidar* within the meaning of sec. 188 of the Bengal Tenancy Act. Consequently the zemindar is entitled to sue the *dur-mourasidar* to have the lands measured and rent assessed upon the excess lands at the contract rate.—Matangini *v.* Ram Das, 6 C. W. N. cxlviii, 7 C. W. N., 93. A majority of landlords can apply for a survey and record of rights of any estate or tenure or part thereof under s. 201, clause (*a*) *ante*. One or more proprietors or tenure-holders may apply for a record of particulars under s. 103 *ante* and so obtain a survey of lands. Disputing an entry made in the course of a record of rights proceeding under sec. 106 of the Act does not come within the meaning of the words "anything which the landlord is under this Act required or authorised to do" as used in sec. 188:—Sher Bahadur Sahu *v.* M. H. Mackenzie, 7 C. W. N., 400. An application under s. 69 *ante* for the appraisement or division of crops is only authorized by this Act and not by the Code of Civil Procedure; a joint landlord cannot make a separate application under that section, unless the whole body of landlords join—Nukheda Sing v. Ripu Mordan Singh, 4 C. W. N., 239. A joint landlord cannot apply separately for registration of improvements under section 80 *ante*, or for recording evidence of an improvements (section 81, *ante*,) for acquisition of land for building or other purposes for the good of the holding or estate (section 84, *ante*,) and cannot file a notice and enter an abandoned holding under section 87 *ante*, or apply for a settlement of rents under section 105 (1) and (2) *ante*, or institute a suit for having a dispute decided by a Revenue-officer under section 106 *ante* or make an application for having land alleged

Joint-landlord.

Application under s. 158.

Measurement under s. 90 or s. 101.

Application under s. 103.

S. 106.

Appraisement under s. 69.

Ss. 80, 81, 85, 84, 87, 105 106, 118, 121, 162 and 180 (3).

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to be proprietor's private land recorded as such (section 118, *ante*), or apply for distraint (section 121, *ante*), or apply for attachment and sale of a tenure or holding (section 162, *ante*.—Bhabanath Rai *v.* Durga Prosunno Ghosh, I. L. R., 16 Cal., 326; Beni Madhub Rai v. Jaodali Sarkar, I. L. R., 17 Cal., 390; Durga Charan Mandal *v.* Kali Prosunno Sarkar, I. L. R., 26 Cal., 727; 3 C. W. N., 586; Sadagar Sarkar *v.* Krishna Chandra I. L. R., 26 Cal., 937; 3 C. W. N., 742; Jafip *v.* Ram Kumar, 3 C. W. N., 747). Or apply for declaration that *chur* or *dearah* land has ceased to be *chur* or *dearah* land [section 180 (3), *ante*]. A suit for recovery of damages for value of trees cut down by a tenant is maintainable at the instance of one of several joint landlords:—Hrisi Kesh *v.* Sadhu Churn, 2 C. W. N., 80.

Suit for recovery of damages.

Rules under Act.

189. The Local Government may, from time to time by notification in the official Gazette, make rules consistent with this Act—

Power to make rules regarding procedure, powers of officers and service of notices.

(1) to regulate the procedure to be followed by Revenue-officers in the discharge of any duty imposed upon them by or under this Act, and may by such rules confer upon any such officer—

(*a*) any power exercised by a Civil Court in the trial of suits;

(*b*) power to enter upon any land, and to survey, demarcate, and make a map of the same, and any power exerciseable by any officer under the Bengal Survey Act, 1875; and

V. (B.C.) of 1875.

(*c*) power to cut and thresh the crops on any land and weigh the produce, with a view to estimating the the capabilities of the soil; and

(2) to prescribe the mode of service of notices under this Act where no mode is prescribed by this or any other Act.

Rules:—The rules made by the Local Government under this section, with the Board's instructions thereon, are contained in Appendix to this work. It was held in Upadhya Thakur v. Persidh Singh, (I. L. R., 23 Cal., 723), that rule 25 of the former Chap, VI of the Government rules under the Act which allowed any number of tenants occupying land under the same landlord to be joined as defendants in the same proceeding for the settlement of rents had been legally made by Government under clause (1) of this section. See rule 39 of the person

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Chap. VI All rules in the Board of Survey and Settlement Manual relating to the duties of Revenue officers making a survey and preparing a record-of-rights under authority of section 101 of the Bengal Tenancy Act, so far as such officers are judicial officers and purporting to be instructions to those officers, which have not been passed by Government in the manner prescribed by secs. 189 and 190, are altogether without sanction of law and are in no way binding on such officers.—Secretary of State for India *v.* Nitai Singh I. L. R., 21 Cal., 49).

Rules for Chota Nagpur:—For rules made under section 189 for the Chota Nagpur Division, see Notification No. 3395, dated the 24th November 1903, in the *Calcutta Gazette* of 1903, Part I, page 1500.

Service of notice:—The mode of service of notices, where no other mode is prescribed by this Act or by the rules contained in Chapter V of the Government rules, is given in rule 3 of Chapter I of the Government rules in the Appendix.

Procedure for making, publication and confirmation of rules.

190. (1) Every authority having power to make rules under any section of this Act shall, before making the rules, publish a draft of the proposed rules for the information of the persons likely to be affected thereby.

(2) The publication shall be made, in the case of rules made by the Local Government or High Court, in such manner as may in its opinion be sufficient for giving information to persons interested, and, in the case of rules made by any other authority, in the prescribed manner:

Provided that every such draft shall be published in the official Gazette.

(3) There shall be published with the draft a notice specifying a date, not earlier than the expiration of one month after the date of publication, at or after which the draft will be taken into consideration.

(4) The authority shall receive and consider any objection or suggestion which may be made by any person with respect to the draft before the date so specified.

(5) The publication in the official Gazette of a rule purporting to be made under this Act shall be conclusive evidence that it has been duly made.

(6) All rules made under this Act may, from time to time, subject to the sanction (if any) required for making them,

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be amended, added to or cancelled by the authority having power to make the same.

The Local Government is authorised by section 189 *ante* to make rules.

The High Court is authorised by section 100 *ante* to make rules defining the powers and duties of managers, and by section 142 *ante* to make rules for regulating the procedure under Chapter XII and by section 143 *ante* to make rules for modifying the Code of Civil Procedure in its application to suits between landlord and tenant. No rules have been made by the High Court under section 143.

The rules made by these authorities as well as the rules made by the Inspector-General of Registration under s. 69 of the Indian Registration Act will be found in the Appendix to this work.

Provisions as to temporarily-settled districts.

Saving as to land held in a district not permanently settled.

191. Where the area comprised in a tenure is situate in an estate which has never been permanently settled, nothing in this Act shall prevent the enhancement of the rent upon the expiration of a temporary settlement of the revenue, unless the right to hold beyond the term of the settlement at a particular rate of rent has been expressly recognized in settlement-proceedings by a Revenue-authority empowered by the Government to make definitively or confirm settlement.

This is a reproduction of the old law.

The section applies only to tenures and under-tenures.

The section does not apply to an estate which, though not permanently settled in 1793, was permanently settled at a subsequent period.—Tamasha Bibi *v.* Ashutosh, 4 C. W. N., 513. On the Hon'ble Baboo Peary Mohun Mukerji pointing out that the effect of this section will be to exempt a large majority of Government estates from the operation of the rule of twenty years' presumption, the Hon'ble Sir Steuart Bayley said:—"I think we have a right to complain of the repetition of the statement that the Government has made a separate law for Government estates from other estates. There is no such distinction in reality; all temporarily-settled estates will be exactly in the same position; there is no distinction between the Government and any other proprietor, and the assertion that the Government has made a separate provision for their own estates is simply misleading. The rules to which the Hon'ble gentleman object will apply to all lands by whomsoever held in districts which are not permanently settled. The history of the matter is that it is a part of the existing law which provides that the temporary settlement-holder could not contract

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beyond the term of his own settlement; a settlement-holder therefore cannot protect his raiyat against subsequent enhancement in case of the subsequent enhancement of the revenue. That is the law, and it is practically repeated in this section. Then we come to the question of the presumption from twenty years, holding at an unchanged rent. The presumption cannot possibly arise where the revenue, and presumably the rent, is being constantly changed. I do not think the question could be better stated than as it has been formulated by the Rent Commissioners' Bill. The *exception* to section 6 of that Bill says:—'In the case of a tenure or under-tenure situate in an estate not permanently settled, such presumption shall not operate to prevent the enhancement of the rent of such tenure or under-tenure upon the expiry of a temporary settlement of the revenue, unless the right to hold such tenure or under-tenure for ever at a fixed rate of rent has been expressly recognized in settlement-proceedings by a Revenue-authority empowered by Govrnment to make definitively or confirm settlements.' That is to say, where a person has held from the time of the Permanent Settlement there he has a right to go on holding at the same rent, but where you have the rent constantly changed, the presumption does not naturally arise that he has held from the Permanent Settlement. It is no idea of our own."

Power to alter rent in case of new assessment of revenue.

192. When a landlord grants a lease, or makes any other contract, purporting to entitle the tenant of land not included in an area permanently settled to hold that land free of rent or at a particular rent, and while the lease or contract is in force—

(*a*) land-revenue is for the first time made payable in respect of the land, or

(*b*) land-revenue having been previously payable in respect of it, a fresh settlement of land-revenue is made,

a Revenue-officer may, notwithstanding anything in the contract between the parties, by order, on the application of the landlord or of the tenant, fix a fair and equitable rent for the land in accordance with the provisions of this Act.

Section 192 applies to tenants generally of land not included in permanently-settled areas.

In the Statement of Objects and Reasons it was said this section in effect enacts that contracts fixing rents shall, in tem-porarily-settled tracts, hold good only until a fresh settlement is made, and that the reasons for the provision were similar to those stated in connection with section 20 (the present section 191).

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Rights of pasturage, &c.

Rights of pasturage, forest-rights, &c.

193. The provisions of this Act applicable to suits for the recovery of arrears of rent shall, as far as may be, apply to suits for the recovery of anything payable or deliverable in respect of any rights of pasturage, forest-rights, rights over fisheries and the like.

This section produces and extends clause 4 of s. 23 of Act X of 1859.

Pasturage.—A right of occupancy may grow in land used for grazing horses.—(Fitz Patrick *v.* Wallace, 11 WR. ., 231), but not when the tenant had merely a right to graze cattle, cut wood, catch fish or cut the grass of thatching grass land which grew spontaneously, and which he in no way cultivated.—(Gur Dial *v.* Ram Dut, 1 Agra, F. B., 15).

Fisheries:—The right to a julkur by no means involves a right to the soil.—(Radha Mohan *v.* Nil Madhub, 24 W. R., 200; David *v.* Grish Chunder, I. L. R., 9 Cal., 183.) But there is no broad proposition of law, as that the settlement of a julkur implies no right in the soil.—Rakhal Churun *v.* Watson & Co., I. L. R., 10 Cal., 50. No right of occupancy can be acquired in a julkur or fishery.—Umakanta *v.* Gopal Singh, 2 W. R., (Act X), 19; Juggobunhoo *v.* Promotho, I. L. R., 4 Cal., 767. Ballai Sati *v.* Akram Ali, I. L. R., 4 Cal., 961. The right of occupancy does not accrue in a tank used only for the preservation and rearing of fish—Gopal Chunder *v.* Shiba, 19 W. R., 200. A right of occupancy is not acquired in a tank when the tank is the principal subject of the lease; but where land is let for cultivation and there is a tank upon it, the tank would go with the land, and if there was a right of occupancy in the land, there would be a right of occupancy in the tank as appurtenant to the land.—Nidhy Krishna *v.* Ram Dass, 20 W. R., 341; Sham Narain *v.* The Court of Wards on behalf of the Rajah of Durbhungah, 23 W. R., 432. Proof of acts of mis-appropriation of fish in the *bhils*, unless done by a person or defined number of persons, even if such acts had the power of depriving the owner of a property wholly of its profits, would not amount to dispossession of the owner; nor would it confer a prescriptive right of fishery on the defendants.—(Luchmiput *v.* Sadatullah, 12 C. L. R., 382. But where the defendants were ascertained persons who under a claim of right adverse to the plaintiffs continuously exercised the right of taking fish from a *bhil* for more than 12 years, it was held that the plaintiffs' claim was barred by limitation. It was further held that a julkur was not an easement within the meaning of s. 27 Act IX of 1771.—Parbutty Nath *v.* Madhoo 1 C. L. R., 592. A party owning the right of fishery in a river from the time of the Permanent Settlement is at liberty to exercise that right in the open channels and also in all closing and closed channels abandoned by the river up to the time when

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the channels became finally closed at both ends, *i. e.*, so long as fish can pass to and fro.—Krisnendra Roy *v.* Maharani Surnomoyee, 21 W. R., 27. In the case of Kali Soonder *v.* Dwarka Nath, 18 W. R., 460; it was held that if the inlets to such channels were dried up, and the defendants acquired a right to the land by the law of accretion, that right would be subject to the exercise by the plaintiffs of their prior right of fishery. The right of fishing in a navigable river does not belong to the public, nor is the Government prohibited by law from granting to individuals the exclusive right of fishing in such a river.—Chunder *v.* Ram Chunder, 16 W. R., 212. The exclusive right of fishery in tidal navigable rivers may be granted by the Crown to private individuals; such a right must ordinarily be proved either by proof of a direct grant from the Crown or by prescription. In the absence of title by grant of prescription in persons alleging themselves to be the holders of a julkur under an ijara, the mere payment of rent by fishermen to former ijaradars does not estop such fishermen from disputing the rights of the alleged holders; but such payment for the use of the julkur right is strong evidence of the rights of the alleged holders of the ijara and of acquiescence in their title.—Hori Das *v.* Mahomed Jaki, I. L. R., 11 Cal.. 434 F.B. In Satcowri *v.* The Secretary of State for India in Council, I.L.R., 22 Cal., 252, the Judges discussed the above cases and observed as follows:—"Upon the cases we have just referred to, it may be accepted as law on this side of India that the bed of a tidal and navigable river is vested in the crown; and that the right of julkur (fishery) in such river, as also the bed of the river itself may be granted by Government (whether it be in the exercise of their prerogative as the crown or as representing the public) to private individuals to be held by them as private property, subject of course to the right of navigation and such other rights which the public has in such rivers. The term "jalkar" signifying water right, includes every right which is of that nature and accordingly embraces not only the right to fishing and other interests of a similar kind in the produce of a river but also rights to gift and stranded timber.—Amritesswar Debi *v.* The Secretary of State for India, I. L. R., 24 Cal., 504, P. C.; 1 C. W. N., 249.

No road-cess upon julkur:—Road cess and public works cess cannot be chargel on any julkur.—David *v.* Grish Chunder Guha, I. L. R., 9 Cal., 183.

Jurisdiction:—Under s. 144 *ante* a suit for julkur dues will lie in the Court where the suit for establishment of the right of fishery would be instituted.—Shibu Haldar *v.* Gopi Sundar Dasi, 1 C. W. N., lxxxvii. A person who has for a time exercised the right of fishing in waters which cover land which does not belong to him and who is forcibly prevented from fishing in such waters cannot maintain an action under sec. 9 of the Specific Relief Act:—Fadu Jhala *v.* Gour Mohon, I. L. R., 19 Cal,, 544 (F. B) A suit for possession of a julkur or right to fish in a *khal*, the soil of which does not belong to the plaintiff, does not come within the provisions of s. 9 of the Specific Relief Act:—Natabar *v.* Kubir, I. L. R., 18 Cal., 81.

Ferry tolls:—The provisions of the Rent Law are not applicable to a suit relating to ferry tolls.—Rachhea Singh *v.* Upendra Chandra, I. L. R., 27 Cal., 239.

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Saving for conditions binding on landlords.

194. Where a proprietor or permanent tenure-holder holds his estate or tenure subject to the observance of any specified rule or condition, nothing in this Act shall entitle any person occupying land within the estate or tenure to do any act which involves a violation of that rule or condition

Tenant not enabled by Act to violate conditions binding on landlord.

Saving for special enactments.

Saving for special enactments.

195. Nothing in this Act shall affect—

(*a*) the powers and duties of Settlement-officers as defined by any law not expressly repealed by this Act;

(*b*) any enactment regulating the procedure for the realization of rents in estates belonging to the Government, or under the management of the Court of Wards or of the Revenue-authorities;

(*c*) any enactment relating to the avoidance of tenancies and incumbrances by a sale for arrears of the Government revenue;

(*d*) any enactment relating to the partition of revenue-paying estates;

(*e*) any enactment relating to patni tenures, in so far as it relates to those tenures; or

(*f*) any other special or local law not repealed either expressly or by necessary implication by this Act.

Sub-section (a):—See Regulations VII of 1822, IX and XI of 1825, and IX of 1833; Act VIII, B. C. of 1879.

Sub-section (b):—See Act VII (B. C.) of 1868, and Act VII (B. C.) of 1880, "The public Demands Recovery Act," and 1 B. C. of 1895,

Sub-section (c):—See sections 37 and 52 of Act XI of 1859 and 11 and 12 of Act VII (B. C.) of 1868: Act II (B. C.) of 1871. Compare Koylash Bashini Dossee *v.* Gocool Moni Dossi, I. L. R., 8 Cal., 230.

Sub-section (d):—See Act V of 1897 B. C.

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Sub-section (e):—See Regulation VIII of 1819. The Putni Regulation (Reg. VIII of 1819) is specially saved from the operation of the Bengal Tenancy Act by sec. 195 (e).—Gyanada Kantha *v.* Brahmomoyi, I. L. R., 17 Cal., 162; see notes under sec. 13. Secs. 15 do not affect the provisions of Reg. VIII of 1819 and they are therefore applicable to a putni tenure.—Durga Prasad *v.* Brindabun, I. L. R., 19 Cal., 504; see notes under secs. 15 and 16. Dar-patni tenures are not included within the terms of clause (*e*) of sec. 195. "The words, in so far as it relates to those tenures must, we think, be treated as expressly limiting the provision to enactments, relating to patnis properly and strictly so called, and as intended to exclude those which relate to tenures which, although resembling patnis, as dar-patnis, &c., are not strictly patnis, not possessing all the qualities of them." Section 13 of this Act, therefore, applies to sales of dar-patni tenures in execution of decrees.—(Mahomed Abbas Mandal *v.* Brajo Sundari Debi, I. L. R., 18 Cal., 360. So, notwithstanding a stipulation in a patni lease that on default of any instalment of rent, the landlord shall be entitled to realize it by the sale of the patni, the patnidar is personally liable.—(Sourendro Mohan Tagore *v.* Sarnomay, I. L. R., 26 Cal., 103).

Construction of Act.

Act to be read subject to Acts here-after passed by Lieutenant-Governor of Bengal in Council.

196. This Act shall be read subject to every Act passed after its commencement by the Lieutenant-Governor of Bengal in Council.

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SCHEDULE I.

(*See section 2.*)

REPEAL OF ENACTMENTS.

Regulation of the Bengal Code

Number and year.	SUBJECT OF REGULATION.	Extent of repeal.
VIII of 1793	A Regulation for re-enacting with modifications and amendments the rules for the Decennial Settlement of the public revenue payable from the lands of the zemindars, independent taluqdars and other actual proprietors of land in Bengal, Bihar and Orissa, passed for those Provinces respectively on the 18th September, 1789, the 25th November, 1789, and the 10th February, 1790, and subsequent dates.	Sections 51, 52, 53, 54, 55, 64 and 65.
XII of 1805	A Regulation for the settlement and collection of the public revenue in the zilla of Cuttack, including the parganas of Pattáspur, Kummadichour and Bagrae, at present included in the zilla of Midnapore.	Section 7.
V of 1812	A Regulation for amending some of the rules at present in force for the collection of the land-revenue.	Sections 2, 3, 4, 26 and 27.
XVIII of 1812	A Regulation for explaining section 2, Regulation V, 1812, and recinding sections 3 and 4, Regulation XLIV, 1793, and sections 3 and 4, Regulation L, 1795, and enacting other rules in lieu thereof.	The preamble and sections 2 and 3.
XI of 1825	A Regulation for declaring the rules to be observed in determining claims to lands gained by alluvion or by dereliction of a river or the sea.	In clause I of section 4 from and including the words "nor if annexed to a subordinate tenure" to the end of the clause.

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SCHEDULE I.

APPEAL OF ENACTMENTS—(*contd.*)

Acts of the Bengal Council.

Number and year.	SUBJECT OF REGULATION.	Extent of repeal.
VI of 1862	An Act to amend Act X of 1859 (to amend the law relating to the recovery of rent in the Presidency of Fort William in Bengal).	The whole Act.
IV of 1867	An Act to explain and amend Act VI of 1862, passed by the Lieutenant-Governor of Bengal in Council, and to give validity to certain judgments.	The whole Act.
VIII of 1869	An Act to amend the procedure in suits between landlords and tenants.	The whole Act.
VIII of 1879	An Act to define and limit the powers of Settlement-officers.	The whole Act.

Act of the Governor-General in Council.

Number and year.	SUBJECT OF REGULATION.	Extent of repeal.
X of 1859	An Act to amend the law relating to the recovery of rent in the Presidency of Fort William in Bengal.	The whole Act.

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SCHEDULE II.

FORMS OF RECEIPT AND ACCOUNT.

(*See sections 56 and 57.*)

FORM OF RECEIPT.

PARTICULARS OF THE HOLDING (LANDLORD'S PORTION.

1 Serial number of Receipt

2 Estate ; Village ; *Thana*

3 Tenant's name , Son of

4 Particulars of the holding—

Nukdi, Bighas ; rent Rs.

Bhaoli, Bighas ; Maunds or Rs.

Jalkar, Rs.
Bunkur, Rs.
Phulkur, Rs.

Government Cesses { Road Cess Rs. / Public Works Cess, Rs

5 Signature of the Landlord or his Authorised Agent.

FORM OF RECEIPT,

PARTICULARS OF THE HOLDING (TENANT'S PORTION)

1 Serial number of Receipt

2. Estate ; Village ; *Thana*

3 Tenant's name ; Son of

4 Particulars of the holding—

Nukdi, Bighas ; rent Rs.

Bhaoli, Bighas ; Maunds or Rs.

Jalkar, Rs.
Bunkur, Rs.
Phulkur, Rs.

Government Cesses { Road Cess, Rs. / Public Works Cess, Rs.

5. Signature of the Landlord or his Authorised Agent.

Section 55 of the Bengal Tenancy Act, 1885, provides as follows :—

(1) When a tenant makes a payment on account of rent, he may declare the year or the year and instalment to which he wishes the payment to be credited, and the payment shall be credited accordingly.

(2) If he does not make any such declaration, the payment may be credited to the account of such year and instalment as the landlord thinks fit.

As to special forms of receipt prescribed for particular cases, see *ante*, page.

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(Schedule II.—Forms of Receipt and Account)—contd.

DETAILS OF PAYMENTS (LANDLORD'S PORTION).

Date of payment, and name of person through whom paid.	Nukdi.		Bhaoli.		Jalkar, &c.		Cesses.		Signature of the landlord or his authorised agent.
	Current on account of kist.	Arrear on account of year, kist.	Current on account of crop	Arrear on account of year, crop	Current on account of kist	Arrear on account of year, kist	Current on account of Kist	Arrear on account of year, kist	

DETAILS OF PAYMENTS (TENANTS PORTION).

Date of payment, and name of person through whom paid.	Nukdi.		Bhaoli.		Jalkar, &c.		Cesses.		Signature of the landlord or his authorised agent.
	Current on account of kist.	Arrear on account of year, kist.	Current on account of crop	Arrear on account of year, crop	Current on account of kist	Arrear on account of year, kist	Current on account of Kist	Arrear on account of year, kist	

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(*Schedule II.—Forms of Receipt and Account*)—contd.

FORM OF ACCOUNT.

1. Year
2. Tenant's name
3. Particulars of holding—(area, rent, &c.)

	Bighas	Rate	Rs. A. P.
Nukdi			

Government Cesses

	Bighas	Maunds	Rs. A. P.
Bhaoli			
Jalkar	...	...	...
Bankar	...	...	...
Phalkar	...	...	...

	Maunds	Rs. A. P.
4. Demand of the year	...	...
5. Balance of former years (*Bakaya*)		...
		Rs. A. P.
6. Total demand (current and arrear)		...
7. Paid each on account of { Current demand. Arrear demand Maunds.		
8. Paid in kind ...	...	...
		Rs. A. P.
9. Balance outstanding at end of year		...

10. Signature of the landlord or his Authorized Agent.

FORM OF ACCOUNT.

1. Year
2. Tenant's name
3. Particulars of holding—(area, rent, &c.)

	Bighas	Rate	Rs. A. P.
Nudki			

Government Cesses

	Bighas	Maunds	Rs. A. P.
Bhaoli			
Jalkar	...	...	...
Bankar	...	...	...
Phalkar	...	...	...

	Maunds	Rs. A. P.
4. Demand of the year	...	...
5. Balance of former years (*Bakaya*)		...
		Rs. A. P.
6. Total demand (current and arrear)		...
7. Paid each on account of { Current demand. Arrear demand Maunds		
8. Paid in kind ...	...	...
		Rs. A. P.
9. Balance outstanding at end of year		...

10. Signature of the Landlord or his Authorized Agent

A modified form of account has been prescribed for use in the Orissa Division—see page 598 *post*.

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N. B.—*Particulars of the holding*, at the heading of the receipt as well as in sub-heading 4, do not mean any particulars as to the incidents of the tenure, such as *mokurari* or *ticca*, but mean the particulars that are given below, *e. g.*, sub-heads 1 to 5 in one case, and nukdi, bhaoli, julkur, bunkur, phulkur, and Government cessses in the other case. The details of payment, *e. g.*, the date of payment, and the name of person through whom paid, for current year or past years, &c, are to be given on the back. Under cl. (*e*) of s. 195 of the Bengal Tenancy Act, nothing in that Act shall affect any enactment relating to patni tenures. It is not, therefore, incumbent upon a zemindar to give receipts to a patnidar according to this form, though if he chooses he may adopt it. Under s. 53, if the tenant has made an agreement, rents will be due from him according to the instalments therein mentioned. If there be no agreement but established usage which regulates the instalments according to which rents are paid in the estate, they will be payable according to such usage. If there be neither agreement nor established usage, then the rents will be payable in four quarterly instalments of the agricultural year *i. e.*, in Bengal, one-fourth on the last day of Asar, one-fourth on the last day of Assin one-fourth on the last day of Pous, and one-fourth on the last day of Choitra. In Behar the agricultural year commences in *Asar*, and the last days of every quarter commencing from the first of Asar will be the days on which rents are due. In all cases interest under s. 67 will have to be calculated only from *expiration of every quarter, any stipulation to the contrary notwithstanding.* For example, supposing the yearly rent of *A*, a tenant, is Rs. 100, and he does not pay during the year, his accounts in the landlord's office will stand thus :—

In Bengal due on 30th Asar	Rs.	25	0
Interest from 1st to 30th Sravan at 12 per cent.	"	0	4
Ditto from 1st to 30th Bhadro	"	0	4

and so on ; apply the rule to Behar.

The particulars to be inserted in the receipt to be granted to a tenant are :—

(1) Serial number of the receipt.

(2) "Estate" means the particular lot mehal in which the holding is situate, not the pargana or the kismut of which it may form a part ; thus, if pargana Sultanabad be a large estate and B takes a patni of two villages in it calling them Lot X, Lot X will have to be mentioned in the receipt. (Sub-section 1 of s. 3.)

"*Village.*"—Sub-section 10 of s. 3.

"*Tenant's name,*" i. e., the registered tenant.

"*Particulars of holding,*" i. e., nukdi or bhaoli, julkur, bunkur phulkur, and Government cesses; where any one of these items would be wanting, it should be written *nil.* The common element of all the items is the total in rupees. Where the exact area comprised in the tenant's holding is not known, it is advisable not to state it, and the landlord under sub-s. (3), s. 56, is required to insert only such particulars as he "can specify at the time of payment." Under the former system the gomashta or naib used to sign receipts, but according to the provision of s. 56,

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sub-s. (1), to receipt is to be "signed by the landlord;" under sub-s. (3), s. 187, however, "an authorized agent" may sign.

So under s. 181 this Act does not apply to *ghatwali and service tenures;* therefore these receipt forms need not be adopted with respect to them as a matter of necessity. As to homesteads, if their incidents are governed by local custom, the customary forms of receipt will obtain (s. 182).

The Local Government has published the following resolution on the 30th January 1888:—

"Under the proviso to section 56, clause 3 of the Bengal Tenancy Act, VIII of 1885, the Lieutenant-Governor is pleased to sanction the form of rent receipt annexed to this notification for the areas specified below until further orders:—

"Specifications of Areas.

"1. Estate No. 162 in pergunnah Barhakpur in the Rajshahye District.
2. Do. ,, 165 Do. Do. Do.
3. Do. ,, 167
4. Do. ,, 169
5. Do. ,, 129."

Form of rent receipt.

রসীদ রূপেয়া বাবৎ খাজনাদি

পরগণা

মৌজা

জমিদার

প্রজার নাম

পিতার নাম

খাজনা কোঃ একুন
মঃ

আদায়কারীর স্বাক্ষর

টাকা দিবার তারিখ

মন্তব্য। এই খাজনা ১২৯১ সালের পৌষ কিস্তির পর জমানার হিসাব অনুসারে মুজরা পড়িবে তৎপূর্ব্ব জমানার মুজরা পড়িবে না।

রসীদ রূপেয়া বাবৎ খাজনাদি

পরগণা

মৌজা

জমীদার

প্রজার নাম

পিতার নাম

খাজনা কোঃ একুন
মঃ

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NOTIFICATION—No. 377L.R.

The 22nd January 1894.—Under section 57 (2) of the Bengal Tenancy Act, No. VIII of 1885, the Lieutenant-Governor is pleased to prescribe the following modified form of account for use in the Orissa Division.

C. E. BUCKLAND,
Secy. to the Govt. of Bengal.

BENGAL TENANCY ACT VIII OF 1885.

FORM OF ACCOUNT.

(To be kept by the landlord.)

1. Year .
2. Raiyat or tenure-holder's name, , son of
   Resident of mauza , pargana
   Mân. Gunt. Bis. Gunda.
3. Area of tenure or holding ... { Nakad Jama ... ; Bhag or sanja { Paddy ; Other kinds }
   Rent of tenure or holding ... { Rupees ... ; Bharans ... }
   Rs. A. P.
   Miscellaneous { Fishery ... ; Bankar ... ; Phalkar ... ; Other kinds ... }
   Government cesses, *i.e.*, road and public works cesses.
4. Name of the landlord with extent of his share.
   Quantity. Rs. A. P.
5. Demand of the year as per above share of the landlord.
6. Balance of former year (bakaya) as per ditto.
7. Total demand (current and arrea) ...
8. Paid cash on account of ... { Current demand ; Arrear ,, }
9. Paid in kind ... Bharan ...
   Total ...
10. Balance outstanding at end of year ...
11. Signature of the landlord or his authorised agent.

BENGAL TENANCY ACT VIII OF 1885.

FORM OF ACCOUNT.

(To be given to the tenant.)

1. Year .
2. Raiyat or tenure-holder's name, , son of
   Resident of mauza , pargana
   Mân. Gunt. Bis. Gunda.
3. Area of tenure or holding ... { Nakad Jama ... ; Bhag or sanja { Paddy ... ; Other kinds }
   Rent of tenure or holding ... { Rupees ... ; Bharans ... }
   Rs. A. P.
   Miscellaneous { Fishery ... ; Bankar ... ; Phalkar ... ; Other kinds ... }
   Government cesses, *i.e.*, road and public works cesses.
4. Name of the landlord with extent of his share.
   Quantity. Rs. A. P.
5. Demand of the year as per above share of the landlord.
6. Balance of former year (bakaya) as per ditto.
7. Total demand (current and arrear) ...
8. Paid cash on account of ... { Current demand ... ; Arrear ,, ... }
9. Paid in kind ... Bharan ...
   Total ...
10. Balance outstanding at end of year ...
11. Signature of the landlord or his authorized agent.

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NOTIFICATION—No. 378L R.

The 22nd January 1894.—Under section 56 (3) of the Bengal Tenancy Act, No. VIII of 1885, the Lieutenant-Governor is pleased to prescribe the following modified form of rent receipt for use in the Orissa Division.

C. E. BUCKLAND,
Secy to the Govt. of Bengal.

FORM OF RENT RECEIPT UNDER ACT VIII OF 1885.

(This portion to be kept by the landlord.)

1. Serial No. of receipt—
2. Estate , village , pargana .
3. Raiyat or tenure-holder's name— , son of , resident of .

Man. Gts. Bis. Gunda.

4. Area of tenure or holding ... { Nakad Jama ... m ..... ; Bhag or sanja { Paddy ... ... ; Other kinds, *viz.*— ... ... }

Rent of teuure or holding { Rupees ... ... ; Bharans ... ... }

Rs. A. P.

Miscellaneous { Fishery ... ... ; Bankar ... ... ; Phalkar ... ... ; Other kinds ... ... }

Government cesses, *i.e.*, road and public works cesses ... .

5. Signature of the landlord or his authorised agent.

Details of Payment.

Date of payment and name of the person through whom paid	Nakad Jama		Bhag or Sanja.		Miscellaneous.		Government cesses.	
	Current on account of kist (*specify below.*)	Arrear on account of year (*specify below.*) kist (*specify below.*)	Current on account of crop (*specify below.*	Arrear on account of year (*specify below*) crop (*specify below.*)	Current on account of kist (*specify below.*)	Arrear on account of year (*specify below.*) kist (*specify below.*)	Current on account of kist (*specify below.*)	Arrear on account of year (*specify below.*) kist (*specify below.*)
1	2	3	4	5	6	7	8	9

NOTE.—(1) When a tenant makes a payment on account of rent he may declare the year or years and instalments to which he wishes the payment to be credited, and the payment shall be credited, accordingly.

(2) If he do not make any such declaration, the payment may be credited to the account of such year and instalment as the landlord thinks fit.

(3) Name of crop to be mentioned in columns 4 and 5.

A separate receipt should be given for each separate tenure and holding.

FORM OF RENT RECEIPT UNDER ACT VIII OF 1885.

(This portion to be given to the tenant.)

1. Serial No. of receipt—
2. Estate , village , pargana .
3. Raiyat or tenure-holder's name , son of , resident

Man. Gts. Bis. Gnnda.

4. Area of tonure or holdiug ... { Nakad jama ... ... ; Bhag or sanja { Paddy ... ... ; Other kinds, *viz.*— ... ... }

Rent of tenure or holding { Rupees ... ... ; Bharans ... ... }

Rs. A. P.

Miscellaneous ... { Fishery ... ... ; Bunkar ... ... ; Phalkar ... ... ; Other kinds ... ... }

Government cesses, *i.e.*, road and public works cesses ... ...

5. Signature of the landlord or his authorised agent.

Details of Payment.

Date of payment and name of the person through whom paid.	Nakad Jama.		Bhag or Sanja.		Miscellaneous.		Government cesses.		Signature of the landlord or his authorised agent.
	Current on account of kist (*specify below.*)	Arrear on account of year (*specify below.*) kist (*specify below.*)	Current on account of crop (*specify below.*)	Arrear on account of year (*specify below.*) crop (*specify below.*)	Current on account of kist (*specify below.*)	Arrear on account of year (*specify below.*) kist (*specify below.*)	Current on account of kist (*specify below.*)	Arrear on account of year (*specify below.*) kist (*specify below.*)	
1	2	3	4	5	6	7	8	9	

NOTE.—(1) When a tenant makes a payment on account of rent, he may declare the year or years and instalments to which he wishes the payment to be credited, and the payment shall be credited accordingly.

(2) If he do not make any such declaration, the payment may be credited to the account of such year and instalment as the landlord thinks fit.

(3) Name of crop to be mentioned in columns 4 and 5.

(4) A separate receipt should be given for each separate tenure and holding.

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SCHDULE III.

LIMITATION.

(*See section* 184.)

PART I.—*Suits.*

Description of Suit.	Period of Limitation.	Time from which period begins to run.
1. To eject any tenure-holder or *raiyat* on account of any breach of a condition in respect in which there is a contract expressly providing that ejectments shall be the penalty of such breach.	One year.	The date of the breach.
2. For the recovery of an arrear of rent—	Six months.	The date of the service of notice of the deposit.
(*a*) when the arrear fell due before a deposit was made under section 61 on account of the rent of the same holding.		
(*b*) in other cases.	Three years.	The last day of the Bengali year in which the arrear fell due, where that year prevails, and the last day of the month of *Jeyt* of the *Amli* or *Fasli* year in which the arrear fell due, where either of those years prevails.
3. To recover possession of land claimed by the plaintiff as an occupancy-raiyat.	Two years.	The date of dispossession.

PART II.—*Appeals.*

Description of Appeal.	Period of Limitation.	Time from which period begins to run.
4. From any decree or order under this Act, to the Court of a District Judge or Special Judge.	Thirty days	The date of the decree or order appealed against.
5. From any order of a Collector under this Act, to the Commissioner.	Thirty days	The date of the order appealed against.

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PART III.—*Application.*

Description of Application.	Period of Limitation.	Time from which period begins to run.
6. For the execution of a decree or order made under this Act, or any Act repealed by this Act, and not being a decree for a sum of money exceeding Rs. 500, exclusive of any interest which may have accrued after decree upon the sum decreed, but inclusive of the costs of executing such decree; except where the judgment-debtor has by fraud or force prevented the execution of the decree, in which case the period of limitation shall be governed by the provisions of the Indian Limitatoin Act, 1877. (See notes following.)	Three years ...	(1) The date of the decree or order; or (2) where there has been an appeal, the date of the final decree or order of the Appellate Court; or (3) where there has been a review of judgment, the date of the decision passed on the review.

Article 1:—A suit by a landlord against a tenant for removal of trees which the latter has planted on his holding is not governed by the limitation of one year, but by art. 120, Sched. II. Act XV of 1877.—Gonesh *v.* Gondor, 12 C. L. R., 418. The defendant took certain land from the plaintiff under a registered lease, which contained a clause prohibiting the defendant from digging a tank on the land without the plaintiff's permission. The defendant having nevertheless constructed a tank without such permission, the plaintiff brought a suit to compel him to fill up the tank, and in case he should fail to do so, for compensation. It was held that the period of limitation applicable to such a suit was art. 120 of Sched. II of the Limitation Act.—Kedar Nath *v.* Khetter, I. L. R., 6 Cal., 34. It is doubtful if these decisions will now hold good in the face of the present provision. Art. 32 of Schedule II of the Limitation Act applies to a suit brought under cl. (a) of sec. 25 and sec. 155 of the Bengal Tenancy Act for the ejectment of a tenant and removal of trees planted by him on land leased out for agricultural purposes; art. 120 does not apply to such a case.—Sonan Gope *v.* Raghubir, 1 C. W. N., 223; 24 Cal., 160; their Lordships in delivering judgment said as follows:—We notice that the Legislature in enacting the Bengal Tenancy Act provided one year's limitation for a suit to eject a raiyat on

Suit for ejectment and removal of trees.

Suit under section 25 of B. T. Act.

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account of a breach of condition in respect of which there is a contract expressly providing that ejectment shall be the penalty of such breach; that is to say, for a suit under cl. (b) of sec. 25 of the Act. They omitted to provide in that Act any limitation for a suit under clause (a) of that section, and they may possibly have considered that the general law which provides two years' limitation sufficiently dealt with that case. If it were otherwise there would be an extraordinary difference between the periods provided in the one case for a suit where there is a written contract, and in the other for a suit of a similar nature where there is no written contract. Where a suit, was brought to eject a tenant on the ground of an alleged breach of conditions of the lease, *viz.*, defendant's failure to plant 2,000 betel-nut trees within 5 years from the date of lease, *held* that plaintiffs' cause of action was not a continuing one but accrued at the expiration of the stipulated five years.—Kalee Kamal *v.* Jumut Ali, 11 W. R., 452; 3 B. L. R., Ap., 47.

Date of cause of action: Date of breach.

Art 2:—Art. 2 includes a suit to recover under a lease, and there is no distinction as to the form of the lease, or as to whether it is registered or not.—Ishwari Prrsad Narain Sahi *v.* Crowdy, I. L. R., 17 Cal., 469; Umesh Chander Mandul *v.* Adarmani Dasi, I. L. R., 15 Cal., 221. Suits for rent founded on registered contracts in respect of lands subject to the provisions of the Tenancy Act are governed by the limitation provided by this article.—Mackenzie *v.* Hazi Sayed Mahomed Ali Khan, I. L R., 19 Cal., 1. A registered lease granted for building purposes and for establishing a coal depot is not a lease of land for agricultural or horticultural purposes, and therefore does not come within the operation of the Tenancy Act; the limitation applicable to a suit for rent reserved in such a lease is that prescribed by art. 116 of the Limitation Act.—Raniganj Coal Association *v.* Jadu Nath Ghosh, I. L. R., 19 Cal., 489. The period of limitation applicable to a suit for compensation for use and occupation of land is six years under art. 120 of the Limitation Act.—Watson & Co. *v.* Ram Chand Datta, I. L. R., 23 Cal., 799. "Rent" in this sched. includes "money recoverable under any enactment for the time being in force as if it was rent" and the period of limitation for a landlord to recover a sum of money payable by a tenant under sec. 42 (*b*) of the Bengal Drainage Act is 3 years from the date on which the landlord engages to pay the costs with which he is charged.—Mon Mohini Dassee *v.* Priya Nath Besali 8 C. W. N., 640. A suit for recovery of arrears of rent, brought by an assignee from the landlord, although the assignment is made after the arrears fell due, is a suit for rent, and is therefore exempted from the cognizance of the Court of Small Causes.—Srish Chunder Bose *v.* Nachim Kazi, I. L. R., 27 Cal., 827; 4 W. N., 357; see also Sheikh Munsar *v.* Loke Nath Roy, 4 W. N., 10. But, since the assignee is not the "landlord" according to the definition of that term in section 3, clause (4), and the defendant is not a tenant within the meaning of section 3

Limitation for registered or unregistered lease.

Limitation for building or coal leases.

Rent recoverable under other Act.

Limitation for assignees' suit for rent.

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clause (3), this article is not applicable to such a suit.—Rupchand Mahaton *v.* Godar Singh, 5 C. W. N., xxx.

Article 2, cl. (a): Limitation for deposit of rent:—*Vide* ss. 61—64, *ante*. The old law is to be found in ss. 31 of Act VIII of 1869 B. C., and 6 of Act VI of 1862 B C. The conditions of deposit are very much altered by the new Act. It will be observed that under this article, as under the old law, a suit for arrears of rent, which *fell due before* the deposit, must be brought within six months from the date of the *service* of the notice, *i. e.*, from the date on which the landlord received intimation that the deposit has been made. It must be presumed until shown to the contrary that notice was issued and duly served.—Bejoy Gobind *v.* Karoo Singh, 18 W. R., 531; *vide* s. 114(*e*) of the Evidence Act. Under the old law the notice ought to have been in the form set out in Sched. B of this Act, and if it omitted any of the words used in such Schedule, such omission would be fatal to the plea of limitation.—Kanchan Molla *v.* Rajendra Chundar, 18 W. R., 126. The deposit which is contemplated by this article is a deposit after the rents have *fallen due*; a tenant who deposited rent before it became due, would not be entitled to claim the benefit of the special limitation prescribed in this Act.—Taramonee *v.* Jeebun, 6 W. R., Act X, 99; Shaikh Ahmed Hossein *v.* Sheikh Keramut, 8 W. R., 353; Surjakanta Acharya *v.* Hemanta Kumari, I. L. R., 20 Cal., 498. Where a zemindar had sold a *patni* for arrears of rent, due in 1224, Magh, the patnidar sued for the reversal of the sale, and deposited the rent for 1225. The sale was reversed and the zemindar then sued for the rent of 1224, and was met with the objection that the suit should have been brought within six months from the date of the deposit of the rent of 1225. But the High Court held that this section did not apply, and that the zemindar was entitled to recover, as he had brought his suit within three years allowed by law.—Sheik Mahomed Shukuroollah *v.* Musst. Roomya Bibi, 7 W. R., 487. A suit for rent due for a period prior to a deposit made under Act VIII of 1869 (B.C.) is not barred by s. 31 of that Act, where the contention of the defendants is that the tenure was the depositor's and that the rent was due from him and not from them.—Ramdin *v.* Chunder Pershad, 21 W. R., 278, Tenants who have been in the habit of depositing in Court the rent due to a landlord in his sole name, are not justified, without receiving notice or order to that effect, in making the deposit in the joint names of that landlord and another.—John Rudd Rainey *v.* Nubo Koomar, 24 W. R., 128. By a condition in the lease of a taluk, additional rent became payable in respect of all lands which, not being in a state of cultivation at the time of the lease, should be subsequently brought into cultivation, so soon as the lessee had enjoyed them rent-free for the space of 7 years. Rent having become due under this condition on certain lands which had not been in a state of cultivation at the time of making of the lease the lessee deposited in Court, as the entire rent payable in respect of the taluk, the same amount as he had paid in previous years. In a suit brought a year after the lessor had notice of such deposit to recover the entire rent payable in respect of the lands newly brought into cultivation, it was held that such suit having been instituted more than six months after service of notice of such deposit on the lessee

Notice.

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was barred under Act VIII of 1869 B.C.—Ram Senaputty *v.* Bir Chunder, I. L. R., 4 Cal., 714. When co-sharer landlords are jointly and severally entitled to the rent claimed, the service of a notice of deposit of rent on any one of them will not reduce the period of limitation to six months, as provided in this Article.—Rup Chand Mahaton *v.* Gudar Sing, 5 C. W. N., xxx. I. L. R., 29 Cal. 283.

Notice upon a co-sharer.

Art 2. Clause (b):—This article should be read with sections 53, 54, and 65 *ante*. Observe that under this article the time of limitation does not run from each *instalment* at which the arrear is due but from the last day of the *year* in which the arrear fell due. The limitation of three years allowed for a suit to recover arrears of rent must reckon, not from the date of instalments, but from the day of the year in which the arrear becomes due.—Gobind Kumar Chaudhri *v.* Haro Gopal Nag, 11 W. R., 537. The old provision is to found in sections 32 of Act X of 1859, and 29 of 1869, (B.C.) The new Act cuts the proviso of the old Acts.—Gobind Kumar *v.* Hurogopal, Nag, 11 W. R., 537. Hence the rent of any portion of one year is recoverable any time up to the last day of the third year after its close—Bykant Ram *v.* Musst. Surfoonnesa Begum, 15 W. R., 523. But it is a mistake to suppose that this section only authorizes to recover three years' rent. Thus where a suit is commenced within three years from the end of the Bengali year, 1268, *i. e.*, on the last day of the month of Choitra of 1271, the plaintiff can recover rent for four years, 1268, 1269, 1270, and 1271—Doorga Dass *v.* Nobin Mohan, 6 W. R., Act X 63, Landes *v.* Benode Lal, *Ib.*, 37; Gosain Huree Narain *v.* Baboo Jan, 7 W. R. 301. The period of limitation within which a suit for arrears of rent may, under Bengal Act VIII of 1869, section 29, be instituted, must, in the absence of any special agreement, be calculated from the last day of the year following the expiration of the year for which such rent is claimed.—Woomesh Chunder *v.* Soorjee Kanto, I. L. R. 5 Cal., 713. This has been overruled by a Full Bench in Kashi Kant *v.* Rohini Kant, I. L. R., 6 Cal., 323, which held that the last day on which a suit for the recovery of arrears of rent can be instituted under section 29, Bengal Act VIII of 1869, is the last day of the third year from the close of the year in which the rent became payable. See also Durga Das Chaturji *v.* Nobin Mohan Ghosal, 6 W. R., Act X, 63; Umur Narain Puri *v.* Ararat Lal, 7 W. R., 301 Baikant Ram Rai *v* Sharfunnissa Begam, 15 W. R., 523 Haro Kumar Ghosh *v.* Kali Krishna Thakur, I. L. R., 17 Cal., 251; Barnamayi Dasi *v.* Barmamayi Chaudhurani, I. L. R., 23 Cal, 191. An arrear of rent is not due within the meaning of this section until the rent itself has been determined.—Komul Lochun *v.* Moran Co., 2 W. R., (Act X,) 83. "I may observe," says Norman, J., "that it is an essential part of the definition of rent that it should be certain; until a rent has been definitely fixed and ascertained, either by the agreement of the parties, or those to whose rights and liabilities they succeed, or by some decree of Court or arbitrators, there can, of course be no such thing as an arrear of rent.—Joymony Dassee *v.* Hur Nath, 3 W. R., Act X, 51. The Rent Act recognizes payment in kind as rent. Non-payment in kind, therefore, must be

Rent must be certain.

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deemed to be an arrear of rent and as such a suit may be brought to recover it within three years from the last day of the Bengali year in which it shall have become due. But inasmuch as the actual grain is not producible at any time within three years from the time when it became due, the money value of the grain, as it stood when it was ready for delivery and ought to have been delivered, must necessarily be taken to represent the grain itself.—Krishnabandhu Bhattacharji *v. Rotish*, 25 W. R., 307.

Deduction of time under the general law of limitation.

Under the old law it was held that suits for arrears of rent were not affected by the provisions of the general law of limitation.—J. Poulson *v.* Modu Sudan, 2 W. R., Act X, F. B., 21; Unnoda Persad, *v.* Kristo Kumar 19 W. R., 5, P C.; Gobind Coomar *v.* W. B. Mamson, 23 W. R., 152; Watson & Co. *v.* Dhonendro Chundra, I. L. R., 3 Cal., 6; Purran Chunder *v.* Mutty Lal, I. L. R., 4 Cal., 50.; Woomesh Chunder *v.* Soorjee Kanta, I. L. R., 5 Cal., 713; so it was held that no deduction should be allowed for pendency of suit in a Court without jurisdiction.—Juggurnath *v.* Raghunath, Sp. W. R. (Act X), 120: Modhoo Sudan *v.* Brojonath, 5 W. R., Act X, 44; or for pendency of an enhancement suit.—Nubo Kant *v.* Raja Boroda Kant, 1 W. R., 100; Brojendra Coomar *v.* Rakhrl Chundra, I. L. R., 3 Cal., 79; Hurro Proshad *v.* Gopal Das, I. L. R., 3 Cal., 817; Hurro Proshad *v.* Gopal Das, I. L. R., 9 Cal., 255; I. L. R., 3 Cal., 818; Baroda Kant *v.* Chundra Coomar, 23 W. R., 280; Hurrish Chundra *v.* Srimati Jugdumba Dossi, 16 W. R., 61. As section 14 of the Indian Limitation Act will not apply to this Act, it is doubtful if these decisions will hold good in their integrity. The time during which the plaintiff has been prosecuting with due diligence another civil proceeding against the defendant shall be now excluded in computing the period of limitation, where the proceeding, founded upon the same cause of action, was prosecuted in good faith in a Court which from defect of jurisdiction of other cause of a like nature is unable to entertain it. Whether there is the same cause of action or *bona fides* in the prosecution are questions of fact and will vary according to circumstances. So even under the old law, under certain circumstances, deduction of time was allowed by the Privy Council. Rani Shurnomayi brought to sale, under Regulation VIII of 1819 in execution of a decree for arrears or rent due in 1857. The patni was sold and the arrears were paid out of purchase money and the purchaser was put into possession. A suit was then brought to set aside the sale of this patni taluk on the ground of irregularity. The lower Court decreed the suit, and cancelled the sale on the 26th December 1860, and this decision was upheld by the High Court on appeal on the 30th June 1863. The effect of this judgment was that the Rani had to pay back the purchase-money to the purchaser, and the patnidar recovered possession of his taluk with mesne profits. The Rani then brought a suit for the arrears of 1857, which she had released from the purchase-money, but which on the cancellation of the sale she had been compelled to refund. Her suit was, however, dismissed on the ground that it was barred by s. 32 of Act X of 1859 (s. 29 of the Act), as the suit should have been brought within three years from the time the arrears first became due. The result of this decision was that the Rani was deprived of her rent for 1857, and the painidar got back this patni,

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and at the same time relieved himself from the obligation of paying the rent due for that year. Their Lordships however, thought that upon the fair construction of s. 32 the time had really not run; that upon the setting aside of the sale, and the restoration of the parties to possession, they took the estate, subject to the obligation to pay the rent; and that the particular arrears of rent claimed in this action must be taken to have become due in the year in which that restoration to possession took place; and that the appellant was not therefore barred from the remedy.—Rani Shurnomayi *v.* Shoshee Mukhee, 12 Moo. I. A., 242; 3 B. L. R., P. C., 11; 11 W. R., P. C., 5. The result of this decision seems to be that, so long as a plaintiff is *bona fide* engaged in prosecuting or resisting suits as to rights without which he would be unable to sue, his right cannot be considered to have come into existence, until such litigation has ceased, the decision having frequently been followed by the High Court of Calcutta.—Eshan Chunder *v.* Khajah Asanoollah, 8 B. L. R., 537 note; 16 W. R., 79; Dindoyal *v.* Radha Kishori, 8 B. L. R., 536; Mohesh Chunder *v.* Ganga Moni, 18 W. R., 59; Huronath *v.* Goluknath, 19 W. R., 15. Where a suit for the recovery of arrears of rent was brought more than 3 years after the due date held, that the fact that a suit for enhancement had been brought by the plaintiff within that period and in that suit the plaintiff had claimed enhanced rate for the year in question, stayed the operation of the land of limitation.—Hem Chandra Choudhury *v.* Kali Prosanna Bhadury 8 C. W. N., P. C.; so it has been held that s. 5 of Act XV of 1877, which excludes holidays in computing the period of limitation, will apply to the Rent Act.—Golab Chand *v.* Kristo Chunder, I. L. R., 5 Cal., 314; Khosh Lall *v.* Gunesh *alias* Nunko, I. L. R., 7 Cal., 609. In a suit under Bengal Act VIII of 1869 for arrears of rent which accrued during minority, the plaintiff is not entitled to a fresh period of limitation under ss. 6 and 7 of the Limitation Act, 1877.—Dinonath Panday *v.* Raghoonath Panda, 5 W. R. (Act X Rul.), 41; Biharilal Mukejee *v.* Mongolanatn Mukerjee, I. L. R., 5 Cal., 110; Golap Chand Nowlŏckka *v.* Kishto Chandra Das Biswas, I. L. R., 5 Cal., 314; Khoselal Mathon *v.* Gonesh Dutt, I. L. R., 7 Cal., 690; and Phooldas Koonwar *v.* Lalla Jogeshur Sahay, L. R., 3 I. A., 7; I. L. R., 1 Cal., 226, explained; Khetter Mohan Chukerbtutty *v.* Dinabashy Saha, I. L. R., 10 Cal., 265, distinguished; Girja Nath Roy *v.* Patani Bibi, I. L. R., 17 Cal., 263.

Exclusion of holidays.

Disability of minors.

Article 3.—The old law gave one year's time in a case like this. Section 27 of Act VIII of 1869, B. C. (s. 30, Act X of 1859), was: "All suits to recover the occupancy of any land, farm or tenure from which a raiyat, farmer, or tenant has been illegally ejected by the person entitled to receive rent for the same, shall be commenced within the period of one year from the date of the accruing of the cause of action and not afterwards." The present Act has substituted two years for one. The year must be calculated according to the British Calendar.—Kharro *v.* Premlal, 9 B. S. R., App., 41; 18 W. R., 403; Luchmipat *v.* Raj Coomaree, 23 W. R., 275; Maharajah Joy Mungal *v.* Lall

Old Act.

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Rungpal, 13 W. R., 183. The words "suits to recover the occupancy of land, &c.," in s. 27 of Act VIII of 1869, B. C., included only possessory action against persons entitled to receive rent, and not suits setting out title and seeking to have right declared and possession given in pursuance thereof, and the limitation prescribed in that section applied only to such simple cases of possessory actions.—Nistarin *v.* Kalee Pershed, 21 W. R., 53; Asha *v.* Shaikh Obeeduddin, 23 W. R., 460; Gooroo Das *v.* Bishto Churn, 7 W. R., 86; Baboo Lalljee *v.* Bhugwan, 8 W. R., 337; Dhonaye *v.* Arif, 9 W. R., 306; Ramjoy *v.* Ram Sunder, 2 C. L. R., 4; Nil Madhub *v.* Srinivash, 9 C. L. R., 937; Must. Durjobutty *v.* Chunder, 25 W. R., 217. So in Forbes *v.* Sree Lal, I. L. R., 8 Cal., 365, it was held that s. 27 of Bengal Act VIII of 1869 applies only to such suits for possession as the Court is asked to decide irrespectively of any title, but simply on the ground that the plaintiffs have been ousted otherwise than by legal means. Similarly where a suit by a tenant against his landlord is both in form and substance one to recover possession on the ground of illegal dispossession by the landlord, and no question of the plaintiff's title is raised, the insertion in the plaint of a claim for declaration of the plaintiffs title is not sufficient to prevent the application prescribed by s. 27 of Bengal Act VIII of 1869.—Imam Buksh *v.*—Momin Mondul, I. L. R., 9 Cal., 289. Where the plaintiff alleged that he was the holder of a jote under the defendant, by whom he had been forcibly dispossessed, and sued for a declaration of title and for restoration to possession; and the defendant did not question the plaintiff's tenure, nor his original title, but denied the forcible dispossession, and alleged that the plaintiff had relinquished the land: *Held* that the suit was not one to try a question of title, but was governed by the one year's period of limitation prescribed by s. 27, Bengal Act VIII of 1869.—Srinath *v.* Ramratan, I. L. R., 12 Cal., 606. In Gunesh Das *v.* Gondur Koormi, I. L. R., 9 Cal., 147, it was held that s. 27 of Bengal Act VIII of 1869 only relates to such suits as could be brought either by the landlord or tenant under Act X of 1859, and will not apply to an alternative claim, put forward in a suit for ejectment, to compel the defendant to remove trees from certain lands leased to him for agricultural purposes. Article 120 of Sched. II of Act XV of 1877 is applicable to such claims. In Tamizuddin Munshi *v.* Huronath, 9 C. L. R., 252, where the plaintiff sued to recover possession of certain land as the ancestral mourasi jote of the plaintiffs, from which they had been dispossessed by the defendant, the latter denied the possession, and alleged that the plaintiffs had themselves relinquished the land in question. It was found that although the alleged title was not proved that the plaintiffs had any occupancy-right, they had been dispossessed by the defendant. On appeal it was contended that the suit was barred under s. 27 of Act VIII (B. C.) of 1869, as not having been brought within one year. It was held that the suit involved a question of title, and that the limitation of a year prescribed by s. 27 of the Rent Act therefore did not apply. So in Nilmadhub *v.* Srinivash, I. L. R., 7 Cal., 442, where the plaintiff sued for possession of land, it appeared that the defendants had obtained a darpatni lease of the land in question in 1271 (1865), and that they had immediately dispossessed the plaintiff, and had never acknowledged him to be their

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tenant. The plaintiff instituted his suit within 12 years from the date of dispossession. It was held that the suit was not barred by limitation under s. 27 of Bengal Act VIII of 1869. That section only applies to cases where the relation of landlord and tenant exists, and cannot be pleaded in bar by a defendant who does not admit that such relation has existed. The latest decision on the point is Joyanti Dasi *v.* Mahomed Ali Khan, I. L. R., 9 Cal., 423, where it was held that the limitation provisions of 27, Bengal Act VIII of 1869, have no application to a case in which the plaintiff relies upon his title and seeks to recover possession upon the strength of that title, and in which the defendant denies that title. This was further considered in a more recent case, where the plaintiff alleged that he was the holder of a jote under the defendant by whom he had forcibly dispossessed, and sued for a declaration of his title and for recovery of possession claiming a right of occupancy, and the defendant, while admitting that the plaintiff had for one or two years been a tenant of a small portion of the land in suit denied his title to the remainder, or that he acquiesced in a right of occupancy: *Held*, that the suit was one to try a *boná fide* question of title, and it was not barred by one year's limitation under s. 27 of Bengal Act VIII of 1896, but was maintainable within 12 years from the date of the cause of action.—Basarut Ali *v.* Attap Hosain, I. L. R., 14 Cal., 624 But in one decision it has been held that where a raiyat having a mere right of occupancy in certain land, has been wrongly dispossessed by the zemindar, his suit to recover possession must be brought under s. 27 of Bengal Act VIII of 1869, within one year from the date of dispossession.—Brindabun Chunder *v.* Dhununjoy, I. L. R., 5 Cal., 246. The current of decisions is, however, against this ruling as shown above. This decision on the other hand seems to have guided the Legislature in drafting the provision under comment.

Present law.

The suit now must be to recover possession of land claimed by the plantiff as an occupancy-raiyat. It may be argued that if the limitation of twelve years applies to an occupancy-raiyat, this provision must be superfluous. But it may be answered again that it is meant only for possessory actions. The Act has substituted two years for one, and the raiyat must be an occupancy-raiyat to get the benefit of this article. Under the old law any raiyat might come under the corresponding provision. The decisions of Crowdy *v.* Jukhree Dhanook, 23 W. R., 387, and Crowdy *v.* Rambharoshee Chowdhry, 23 W. R., 383, are overruled. It has been argued however that this article does away with the special provision of a possessory suit as existed under the old law, aud that it applies only to cases where the raiyat sued for possession by establishing his right. In support of the argument, the following passage, from the report of the Rent Commission, has been cited: "We have provided that one year shall be the period of limitation for a suit by a raiyat against his landlord to recover possession of a holding from which such raiyat has been illegally ejected by such landlord *in any case not governed by section 9 of the Specific Relief Act I of 1877*; in other words, for a suit intended to try not merely the question of dispossession without consent but *also a question of title*. For a similar suit by a tenure-holder or under-tenure-holder we have provided a limitation period of three years." Article 17 then provided that for

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a suit "by raiyat against his landlord to recover the possession of a holding from which such raiyat has been illegally ejected by such landlord, *in any case not governed by section 9 of the Specific Relief Act 1877*," one year would be the period of limitation from the date of dispossession; so Art. 20 provided that to a suit "by a tenure-holder or under-tenure-holder against his landlord to recover the possession of a tenure or under-tenure from which such tenure-holder or under-tenure-holder has been illegally ejected by such landlord, *in any case not governed by section 9 of the Specific Relief Act, 1877*," 3 years' limitation applied from the date of dispossession. Now the most important words in these articles, as well as in the extract of the Report of the Commissioners, are "*in any case not governed by section 9 of the Specific Relief Act, 1877*." These words gave to those articles the sense which the Commissioners meant to convey, *e. g.*, that these suits are suits for title. The omission of these words in the article that passed into law tends to show that the original intention was abandoned and the article has been altogether remodelled.

Article 3, Sched. III of Bengal Tenancy Act (Act VIII of 1885), relates to suits brought by an occupancy-raiyat against his landlord, and not to a suit brought against a third party who is a trespasser.—Ramjanee Bibee *v.* Amoo Bepari, I. L. R., 15 Cal., 317. The suit mentioned in this article means a suit by an occupancy-raiyat as such, that is, an occupancy-raiyat claiming a right of occupancy as against his landlord.—Chundra Kishore Dey *alias* Mukhori Dey *v.* Raj Kishore Mozumdar, I. L. R., 15 Cal., 405. A suit by an occupancy raiyat to recover possession of land of which he has been dispossessed by his landlord, in which the title of the tenant is denied and put in issue, is governed by the special period of limitation prescribed by the Bengal Tenancy Act, Sched. III, art. 3, namely, two years from the date of dispossession. It was intended by that enactment to provide for all suits to recover possession of land brought by an occupancy-raiyat, and to limit the period previously allowed to the Courts for suits to recover possession by reason of a title set up and proved by the plaintiff; and not to provide only for suits of a possessory nature such as were previously dealt with by s. 27 of Bengal Act VIII of 1869.—Saraswati Dasi *v.* Horitarun Chuckerbutti, I. L. R., 16 Cal., 741, followed in Ramdhan Bhadra *v.* Ram Kumar Dey, I. L. R., 17 Cal., 926. Where the plaintiffs sued, as occupancy-*raiyats*, to recover possession of land from which they had been dispossessed by the defendants, one of whom was one of their landlords, and the others were persons who had acted in collusion with him, it was held that this article was applicable.—Joolmutty Bewa *v.* Kali Prasanna Roy I. L. R,, 28 Cal., 127; 4 C. W. N., 803 (F. B.); Parameswar Nomosudra *v.* Kali Mohun Nomosudra I. L. R., 28 Cal., 127; 4 C. W. N., 891. In Bheka Singh *v.* Nukchhed Singh, I. L. R., 24, Cal., 40, it was laid down that the operation of the article is not restricted to suits against the landlord, and that it applies also to a suit brought against a tenant with whom the land has been settled by the landlord. Similarly, where the dispossessing defendants had been inducted into the land by the agents of the landlord or where after the ouster, the defendant took a settlement from the landlord, the two years limitation has been held to be applicable.—Chintamoni Sahu *v.* Upendra Nath Sarnokar 4 C. W.

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N., 326. When a defendant who has been added by a Court of its own motion is not in possession and is not a tenant of the land, the two years' rule of limitation does not apply.—Fakira Pasban *v.* Azimunnissa, I. L. R., 27 Cal., 540. Where an occupancy-raiyat is dispossessed by a person whom the landlord has as a tenant, the dispossession being really by the landlord, the limitation applicable to a suit for recovery of possession by the raiyat is that prescribed in Art. 3 of Sched. III. 6 C. W. N., 702 ; s. c., I. L. R., 29 Cal., 610, distinguished :—Rakhit Mohunt *v.* Paddo Barui, 9 C. W. N.. 54 ; Hara Kumar Nath *v.* Sheikh Nasaruddin 4 C. W. N., 665. The two years period of limitation applies, whether the dispossession be by a fractional landlord, the sole landlord, or the entire body of landlords.—Parameswar Nomosndra *v.* Kali Mohun Nomosudra 4 C. W. N., 891. But where the landlord has no connection with the ouster, and has not had, directly or indirectly, any hand in it, the period of limitation applicable is twelve years, although the defendant may claim to hold under the same landlord as the plaintiff.—Eradut *v.* Daloo, 1 C. W. N., 573. Where, again, an occupancy-raiyat has been dispossessed-from his holding by his landlord, not as a landlord but as the representative of the person whose right, title and interest he has purchased in execution of a decree for rent, the special period of limitation prescribed by article 3 is not applicable.—Abhoy Churn Mookerjee *v.* Shaik Titu, 2 C. W. N., 175. Where the plaintiff purchased an occupancy-holding at an auction-sale in execution of a mortgage-decree against an occupancy-raiyat, and sued the landlord to recover possession of the same, although the plaintiff had never been in actual possession at all, and his predecessor had been ejected from possession by the landlord of the occupancy-holding more than two years before suit, and the latter claimed to maintain his possession by virtue of a decree which he obtained for possession as against the occupancy-raiyat, the mortgagor, it was *held* that the case was not governed by the special limitation of two years.—Dinobundhu Saha *v.* Lolit Mohun Moitra, 2 C. W. N., 595. This article does not apply to a suit for the recovery of possession of homestead land not held as part of an occupancy-holding.—Abdul *v.* Kurban, 1 C. W, N,, clxxi, or to suits brought by other than occupancy raiyats (*per* Ghose J., in Ramdhan Bhadro *v.* Ram Kumar De, I. L. R., 17 Cal., 930), *e.g.*, by under-raiyats for the possession of land sub-let to them by an occupancy-raiyat.—Bhagban Chandra Saha *v.* Jagneshar Ghosh, 2 C. W. N., cccxviii.

Time runs from the date of actual ouster.

This period of limitation runs from the date of actual dispossession. A plaintiff cannot have a fresh start of limitation from the date of attachment by a Criminal Court under sec. 146, Crim. Pro. Code.—Deo Narain Chaudhury *v.* Webb, I. L. R., 28 Cal., 86 ; 5 C. W. N., 160. When a raiyat has lost his right to his *jote* by efflux of time and he cannot assert his right to it by reason of this article, the land cannot be brought to sale as his property.—Sarafudin Mandal v. Chandra Mani Gupta, 5 C. W. N., 405.

Limitation in case of non-occupancy raiyat :—It is only in cases of occupancy raiyats that the two years' rule applies.—See Ram Dhun *v.* Ram Kumar, I. L. R., 17 Cal., 926. But it has been held in a recent case that the limitation

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applicable to a suit to recover possession by a non-occupancy raiyat who has been dispossessed from his landlord, otherwise than in due course of law, is 6 months from the date of dispossession as provided by s. 9 of the Specific Relief Act.—Bhagabati *v.* Lutan Mondal, 7 C. W. N. 218, The period of limitation applicable to the case of a non-occupancy raiyat who has been dispossessed from his holding otherwise than in execution of a decree is either 6 or 12 years as provided in the Limitation Act.—Tomizuddin *v.* Ashrub Ali, 8 C. W. N. 446 F. B.

Limitation in case of an under-raiyat:—This article does not apply to a suit by an under-raiyat:—Bhagaban *v.* Janeswar, 2 C. W. N., cccxviii.

Art. 6.—An application for execution of a decree for a sum not exceeding Rs. 500 in value obtained by one of two or more joint landlords for his share of the rent is not governed by the special rule of limitation laid down in Art. 6 of Sch. III of the Bengal Tenancy Act, but by the general law of limitation, namely, art. 179 of the second schedule of Act XV of 1877.—Kedar Nath *v.* Ardha Chandra, 5 C. W. N., 763. The special law of limitation is limited in its operation to decrees made under the Bengal Tenancy Act or any Act repealed by it; a suit by a fractional co-sharer is maintainable, not as a suit under the Bengal Tenancy Act, but as a suit independent of the Act.—*Ibid.* The "final decree" mentioned in this article must be the final decree in the suit and does not include an order in appeal upon an application to set aside that decree under s. 108, C. P. C.—Baikuntha Nath *v.* Aughore Nath, I. L. R., 21 Cal., 387. The period of limitation runs from the date of the decree and not from the date fixed for payment.—Ram Saday *v.* Dwarka Nath, I. L. R., 22 Cal., 644. A decree was made in a suit for rent on the 26th May 1890, ordering the sum of Rs. 400 to be paid in the following August; on the 9th August 1893, an application for execution was made, *held* that the application was barred.—*Ibid.* See also Mamtazul Huq *v.* Nirbhai Sing, I. L. R., 9 Cal., 711.

Final decree.

Date of decree.

Applications in continuance of former proceedings:—An *ex-parte* rent-decree having been obtained on the 30th May 1888 for a sum under Rs. 500, the decree-holder on the 20th May 1889 applied for execution thereof and attached certain properties of the judgement-debtor, the date fixed for the sale being the 31st August 1889. The judgment-debtor applied under s. 108 of the Civil Procedure Code for a rehearing of the rent-suit, and on the day fixed for the sale applied for stay of execution; the sale was stayed, and the Court of its own motion and for its own convenience directed the execution case to be struck off the file "for the present." On the 28th December 1889 the Court passed an order refusing a rehearing of the suit, which order was upheld on appeal on the 16th May 1890. On the 21st January 1892 the decree-holder again applied for execution, at the same time praying that his application might be taken to be in continuation of his former application of the 27th May 1889. *Held*, that the application was one in continuation of the former proceedings in execution so far, at least, as regarded the property mentioned in the former application, but as regards other properties it must be held to be barred as not having been made within three years from the decree of the 30th May 1883.—Baikanta Nath

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Mittra *v.* Aughore Nath Bose, I. L. R., 21 Cal., 387, See also Chunder Prodhan *v.* Gopi mohon I. L. R., 14 Cal., 385.

When the execution of a decree has been unavoidably stayed owing to proceedings being taken to set aside the decree which it is sought to execute, an application for execution made after the expiry of the period of limitation has been regarded as one in continuation of former proceedings.—Issurree Dassee *v.* Abdool Khalak, I. L. R., 4 Cal., 415; following the case of Booboo Pyaroo Tuhobildarinee *v.* Syud Nazir Hossain, 23 W. R., 123.

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APPENDICES

Appendix I.—Amending Acts.
Appendix II.—Local Govt. Rules with Board's Instructions.
Appendix III.—High Court rules.
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BENGAL ACT NO. III OF 1898.

Received the assent of the Lieutenant-Governor on the 5th April 1898, and of the Governor-General on the 3rd May, 1898.

An Act to amend sections 30, 31, 39, 52 and 119 and Chapter X of the Bengal Tenancy Act, 1898.

VIII of 1885.

Whereas it is expendient to amend sections 30, 31, 39, 52 and 119 and Chapter X of the Bengal Tenancy Act, 1885, in the manner hereinafter appearing;

And whereas, the said Act having been passed by the Governor-General of India in Council, the previous sanction of Governor-General has been obtained, under section 5 of the Indian Councils Act, 1892, to the requisite amendments being made by an Act of the Lieutenant-Governor of Bengal in Council;

55 and 56 Vict., c. 14.

And whereas the sanction of the Governor-General has similarly been obtained to the amendment of the Court-fees Act, 1870, which is proposed by section 7 (105) of this Act;

VII of 1870.

It is hereby enacted as follows:—

1. (*1*) This Act may be called the Bengal Tenancy (Amendment) Act, 1898; and

(*2*) It shall come into force on the day on which it is first published in the *Calcutta Gazette* after having received the assent of the Governor-General.

Amendment of Act VIII 1885, section 30.

2. For clause (*a*) of Section 30 of the Bengal Tenancy Act, 1885, the following shall be substituted, namely:—

(*a*) "that the rate of rent paid by the raiyat is below the prevailing rate paid by occupancy-raiyats for land of a similar description and with similar advantages in the same village or in neighbouring villages, and that there is no sufficient reason for his holding at so low a rate."

Amendment of Act VIII 1885, section 31.

3. After clause (*d*) of section 31 of the Act the following shall be inserted, namely:—

[See s. 31].

Insertion of section 31A and 31B in Act VIII, 1885.

4. After section 31 of the said Act the following shall be inserted, namely:—

[See ss. 31A and 31B] *ante*, pp. 171-73.

New Chapter X for Act VIII, 1885.

7. For Chapter X of the said Act the following shall be substituted, namely:—

See Chapter X, *ante* pp. 58-407.

Validation of publication of past records.

8. All records published under section 105 of the Bengal Tenancy Act, 1885, before the commencement of this Act, whether in draft or final form, shall be deemed to have been duly published.

Effect of settlements of rent and decisions by Revenue Officers made before the commencement of this Act VIII of 1885.

9. (*1*) Every settlement of rent or decision of a dispute by a Revenue Officer under section 106 of the Bengal Tenancy Act 1885, before the commencement of this Act, in respect of which no appeal has, before the commencement of this Act, been preferred to the Special Judge appointed under section 108 of that Act, shall have the force and effect of a decree of a Civil Court in a suit between the parties, and shall be final:

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Provided that an appeal shall lie to the District Judge from any such settlement or decision which was made or given within thirty days before the commencement of this Act, if the appeal be presented within thirty days from the date of such settlement or decision.

VIII of 1885.

(2) The provisions of the Code of Civil Procedure relating to appeals shall, as nearly as may be, apply to all such appeals.

XIV of 1882.

10. In section 119 of the Bengal Tenancy Act, 1885, the words and figures "sections 103A, 103B, 106, 107, 108, 109, and 109A" shall be substituted for the words and figures "sections 105 to 109, both inclusive."

VIII of 1885.

Amendment of Act VIII, 1885, section 119.

11. Bengal Act V of 1894 (*an Act to remove doubts which have arisen in connection with the re-settlement of land-revenue in temporary-settled arreas, and to amend the Bengal Tenancy Act, 1815*) is hereby repealed.

Repeal of Bengal Act V. 1894.

BENGAL TENANCY (VALIDATION & AMENDMENT) ACT.

BEING BENGAL ACT NO. I OF 1903.

An Act to validate certain transfers, made under the Bengal Tenancy Act, 1885, of permanent tenures and holdings at fixed rents and of shares in the same; and to amend section 106 of that Act.

VIII of 1885.

WHEREAS doubts and difficulties have arisen respecting the meaning and effect of sections 12, 13, 17 and 18 of the Bengal Tenancy Act, 1885, as regards the payment of the prescribed landlord's fee, and the effect of the non-payment of such fee;

VIII of 1885.

And whereas it is expedient to declare that registered transfers and sales and decrees or orders for foreclosure of mortgage, confirmed and made absolute by the Civil Courts, of permanent tenures and holdings at fixed rates and fixed rents, and of shares in such tenures and holdings, shall not be deemed to be invalid merely on the ground that the landlord's prescribed fee has not been paid;

And whereas it is also expedient to amend section 106 of the said Act in manner hereinafter appearing;

And whereas, the said Act having been passed by the Governor-General of India in Council, the sanction of the Governor-General has been obtained, under section 5 of the Indian Councils Act, 1892, to the passing of this Act;

55 & 56 Vict., c. 14.

It is hereby enacted as follows:—

1. No transfer which has heretofore been made or which may hereafter be made under section 12, section 13, section 17 or section 18 of the Bengal Tenancy Act, 1885, of a permanent tenure, of a holding at a rent or rate of rent fixed in perpetuity or of a share in such tenure or holding, shall be deemed to be invalid merely on the ground that the landlord's fee prescribed by the section 12 or 13 has not been paid:

Validation of transfers of tenures and holdings and shares in the same. VIII of 1885.

Provided always that, subject to the *Explanation* following; nothing in this section shall be held to affect the decision of a Court of competent jurisdiction which has become final before the commencement of this Act.

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Explanation.—A decree in a suit for rent which has become final disallowing a claim for rent on the ground that the relationship of landlord and tenant does not exist between the parties to the suit by reason of the non-payment of the landlord's fee shall not bar a suit for rent which became payable subsequently to such claim.

Realization fee when left unpaid.

2. In any case where the prescribed fee has been or may hereafter be left unpaid, the landlord may, within two years of the commencement of this Act,

or within two years of the date of registration of the document effecting the transfer,

or within two years of the date of confirmation of the sale by the Civil Court,

or within two years of the date upon which a decree or order absolute for the foreclosure of a mortgage has been or may hereafter be made by the Civil Court,

apply to the Collector for realization of such fee from the transferee, or from the auction-purchaser or from the person who has obtained an order absolute for foreclosure of mortgage in the Civil Court, and on such application being presented, the Collector shall realize such fee if still unpaid, together with costs of realization, from such person as if it were an arrear of revenue.

A DECREE WHICH HAS BECOME FINAL:—A decree passed before the passing of Beng. Act I of 1903 but pending in appeal at the commencement of that Act is governed by s. I. of that Act as not being final: Peary *v.* Arsud Ali, 8. C. W. N., 239.

Saving of section 88.

VIII of 1885

3. Nothing in section I shall be deemed to affect the provisions of section 88 of the said Bengal Tenancy Act, 1885.

Substitution of a new section for section 106.

4. For section 106 of the said Act, the following shall be substituted, namely:—

"106. In proceedings under this Part, a suit may be instituted before a Revenue-officer at any time within three months from the date of the certificate of the final publication or the record-of-rights under sub-section 103 A of this Act, by presenting a plaint on stamped paper for the decision of any dispute regarding any entry which a Revenue-officer has made from, the record, whether such

Institution of suit before a Revenue-officer.

dispute be between landlord and tenant or between landlords of the same or of neighbouring estates, or between tenant and tenant, or as to whether the relationship of landlord and tenant exists, or as to whether land held rent-free is properly so held, or as to any other matter, and the Revenue-officer shall hear and decide the dispute:

Provided that the Revenue-officer may, subject to such rules as the Local Government may prescribe in this behalf, transfer any particular case or class of cases to a competent Civil Court for trial.

Short title.

5. This Act may be called the Bengal Tenancy (Validation and Amendment) Act, 1903.

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APPENDIX II.

GOVERNMENT RULES AND BOARD'S INSTRUCTIONS THEREON.

NOTIFICATION.

BENGAL TENANCY ACT

The 21st December 1885.—Under sub-section (5)[1], section 190, of the Bengal Tenancy Act (VIII of 1885), the following Rules are published for general information.

A. P. MACDONNELL,
Secy. to the Govt. of Bengal.

Government Rules under the Bengal Tenancy Act, VIII of 1885 [as amended by Act III (B, C,) of 1898].[*1]

CHAPTER I.—GENERAL.

Section 189.[2]

1. In carrying out the following rules, Revenue-officers shall have regard to the Instructions of the Board of Revenue for the guidance of Revenue-officers, so far as such Instructions are consistent with the rules herein prescribed under Act VIII, 1885.

2. Except where otherwise provided for by law or by these rules, all proceedings and orders of Revenue-officers, passed in the discharge of any duty imposed upon them by or under this Act, shall be subject to the supervision and control of the Board of Revenue; and the orders of each Revenue-officer under this Act shall be subject to the supervision and control of Revenue-officers to whom he may be declared by the Board of Revenue to be, for the purposes of the Act, subordinate.

The Collector and the Commissioner, in whose Jurisdiction operations under these rules are in progress, shall be entitled to inform themselves of the nature and progress of such operations.

Board's Instructions.

Under this rule Assistant Superintendents of the Survey Department appointed to be Revenue-officers are declared to be subordinate to Deputy Superintendents of the Survey Department appointed to be Revenue-officers. Assistant settlement-officers are declared to be Subordinate to Settlement-officers, and Settlement-officers are declared to be subordinate to the Director of Land Records or to the Commissioner or Collector as the Board shall in each case direct.

3. Where no other mode of service of notice is prescribed by the Tenancy Act or by these rules, service shall be effected in the manner prescribed for the service of summons on a defendant under the Code of Civil Procedure, if the notice is addressed to only one person; and, if it is addressed to a number of persons occupying or owning land in the same village, the notice shall be served *in the manner*

As revised by Government Notification No. 1136 L. R., dated the 8th January 1900.

[NOTE.—The footnotes to the Rules in this Appendix which are preceded by figures are by the authors of this work. The other footnotes are reproduced from the official edition of the Rules.]

* By Notification No. 292L. R., published in Part I, page 59, of the *Calcutta Gazette* of the 25th January 1893, these rules were declared to be in force in Orissa so far as they relate to the sections of the Act which have been, or may be, extended to Orissa.

1 For rules made under section 189 for the Chota Nagpur Division, *see* Notification No. 3395, dated 24th November 1903, in the *Calcutta Gazette*, 1903, Part I, page 1500.

2 These references are, in all cases, to the sections of the Bengal Tenancy Act, VIII, 1885.

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prescribed for the service of summons on a defendant under the Code of Civil Procedure, or by proclamation and beat of drum, and by posting it, in the presence of not less than two persons, on some conspicuous place in the village, and also by fixing it up in the village office, if any, where the rent is usually paid.

CHAPTER II.—STAPLE FOOD-CROPS AND PRICE-LISTS.

1. *Section 39 (1).*—The local areas under this section shall be those entered in Schedule II annexed to these rules, and the mart specified in the same Schedule for each local area shall be that at which prices shall be recorded.

2. *Section 39 (7).*—The collector, after such inquiry into the relative extent to which particular food-crops are grown in his district, as he may think necessary, shall cause a notice to be affixed in his office, and in the sub-divisional office, specifying the food-crop or food-crops which in his opinion is or are most extensively grown in each local area.

The notice shall distinguish, as far as may be practicable between crops grown, on high lands and crops grown on low lands; and shall fix a day, not being later than 15 days after the publication of such notice, on which objections will be taken into consideration.

On the day so fixed the Collector shall take into his consideration the objections, if any, to the enumeration of staple food-crops proposed in the notice; and shall report his opinion thereon to the Board of Revenue.

The Board of Revenue shall submit the Collector's opinion to the Local Government, with such remarks as may seem to them necessary.

The Local Government, after considering the reports of the Collector and the Board of Revenue, shall determine and notify in the *Calcutta Gazette* what shall be deemed staple food-crops in each local area.

3. * Price-lists of staple food-crops shall be prepared on one market day in the month, at intervals of not less than twenty days. This market day shall be selected by the Collector, subject to the control of the Board of Revenue.

4. † The price recorded for each staple food-crop shall be the prevailing retail price at which that crop was actually sold, in the mart to which the price-list refers, on the day selected under the last preceding rule.

‡ *Board's Instructions.*

Under Rule 4 the price recorded for each staple food-crop shall be the prevailing retail price at which that crop was actually sold, in the mart to which the price-list refers, on the day prescribed in Rule 3 of the rules issued by Government.

(*a*) The price recorded should be the average of the prices of the different qualities of the staple crop.

(*b*) The price should always be given in *sirs* of 80 *tolas*, standard weight, per rupee.

(*c*) Care should be taken that the price of the staple crops *grown* in the locality is taken into account, and not of those *imported*.

(*d*) When rice is the staple, the price to be recorded is the average of the common qualities of husked rice (*mota chaul*), as distinguished from paddy, consumed for the time being by the middle and poorer classes.

(*e*) The average price of the various kinds of *aman* should be shown throughout the year, and that of *aus* separately during the months in which it is sold.

(*f*) The price of *old* and *new* crop should be shown separately, when both are being sold at the mart.

5. Price-lists shall ordinarily be prepared by a gazetted officer not below the rank of a Sub-Deputy Collector But in special cases, where a Sub-Deputy Collector is not available, the Collector, with the sanction of the Commissioner, may authorize a *kanungo* to prepare the lists.

6. Every officer charged with the preparation of price-lists shall keep a record showing, as far as practicable,—

(*a*) the date of his visit to the mart at which prices are to be recorded;

(*b*) the names of vendors and purchasers, the quantities sold, and the price thereof, for any sales effected in his presence.

Board's Instructions.

The record prescribed to be kept up with the officer charged with the preparation of price-lists under this rule should also contain entries showing the vernacular names of the description of rice and the qualities of the other staples selected from time to time, so as to afford a basis for comparison with the qualities and price which may be recorded at any future time, and also in order that, whenever a change occurs in the officers charged with the preparation of these lists, the new officer may have the means of ascertaining the qualities of the staple selected by his predecessor.

* Government Resolution dated the 23rd of May 1888, published in Part I, page 445, of the *Calcutta Gazette* of the same date.

† Government Resolution dated the 23rd of May 1888.

‡ Circular No. 6, June 1888.

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7. When price-lists are prepared at the *sadr* sub-division by an officer other than a Covenanted Deputy Collector, or at other subdivisions by an officer subordinate to the Sub-divisional Officer, they shall be submitted to the Covenanted Deputy Collector, or a Deputy Collector specially nominated by the Collector for the purpose, or Sub-divisional Officer, as the case may be. Such officer shall scrutinize the lists; he may call for explanation and cause manifest errors to be corrected; and, having satisfied himself of the accuracy of the lists, he shall countersign them.

8 The price-lists shall be published, for not less than one week, at the marts to which they respectively refer, at the Collector's or Sub-divisional Office, and at every police station and *munsifi* in the local area.

Board's Instructions.

The lists shall be published under this rule in the form subjoined :—

Price-list for month of 190
for local area , sub-division , district
, is published under clause (3), section 39 of the Bengal Tenancy Act, VIII of 1885. Any objections which any landlord or a tenant of the aforesaid local area may have to any entry in this list should be presented to the Collector ih writing within a month from the date of its publication :—

Staple food-crop.	Number of *sirs*, of 80 *tolas*, sold per rupee.	Remarks.

District
Sub-division
Collectorate
Dated 190 .

Signature of the officer preparing the list.

_____

Rank _____

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9. After the expiry of the term of publication of the price-list, in the mart to which they refer, as mentioned in the last preceding rule, the lists shall be submitted to the Board, with any objections made to them, and with the opinions of the officers who prepared and counter-signed them, and of the Collector, on such objections.

Board's Instructions.

(*a*) The lists shall be submitted to the Board in the following form:—

Price-list for the month of _____ 190 .

District _____

Local area _____

Mart _____

Staple food-crop or crops.	No. of *sirs* of *tolas* standard weight, per rupee.	Substance of objections,* if any.	Opinions of the officer who prepared the list and of the officer who examined it under Rule 7, and of the Collector, on such objection.	REMARKS.

Signature of the officer who examined the list under Rule 7

_____

Rank _____

Date _____

Signature of the officer who prepared the list

_____

Rank _____

Date _____

(*b*) Whatever the dates fixed for recording prices in local markets may be, the lists should be submitted to the Board of Revenue immediately after the expiry of one month from the date of their publication in the mart to which they refer.

(*c*) In submitting the lists to the Board, the recording officer should invariably explain in the column of remarks causes of variation in prices quoted during the period under report as compared with the last preceding return. The Collector should, after satisfying himself as to the correctness of this statement, initial it. The Collector should, in submitting the lists for the whole district, explain any marked difference between prices ruling in the several local areas of his district.

* Any objections made to this list must be forwarded with it.

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CHAPTER III.—LANDLORDS' IMPROVEMENTS.

1. *Section 80.*—An application for the registration of a landlord's improvement may be presented to the Collector of the district or to the officer in charge of the sub-division in which the land benefited by the improvement is situated, or to any Assistant or Deputy Collector who may be specially appointed by the Government to receive such application. It shall as far as practicable, be in the form specified in Schedule I appended to these rules.

2. The officer receiving the application may, if he thinks fit, require the applicant to present as many copies of the application as there are tenants mentioned in column 7 of the application, or as there are villages mentioned in column 2; and he may, as the case may be, either forward by registered letter copies to the tenants whose names are specified, or may give notice to the tenants by causing a copy to be fixed up in the presence of not less than two persons in some-conspicuous place in every such village.

In either case he shall fix a date for hearing objections to the application, and shall cause that date to be notified to the parties concerned, either by entering it in the copies forwarded by registered letter, or by proclaiming it by beat of drum and by posting, in the presence of not less than two persons, a notice declaring it in each village.

The expenses of such service shall be borne by the applicant for registration.

3. The officer may make over the application to any of his subordinates, not being below the rank of a *kanungo*, for local inquiry and report, and shall in that case fix a date for hearing the report, and shall cause such date to be notified to the parties concerned, in the manner set forth in Rule 2.

The inquiry shall be limited to the ascertainment of the fact whether the alleged improvement is of such a nature as to come within the meaning of section 76 (2), Bengal Tenancy Act, or not.

4. On the date so fixed, or on any date to which the proceedings may be adjourned, the officer shall hear summarily such of the parties and their witnesses as may attend, and shall consider any report submitted to him under Rule 3.

He shall then decide whether the work is an improvement as defined in section 76 (2), Bengal Tenancy Act, and whether the landlord is entitled to register it, and shall accordingly order it to be registered or refuse registration.

5. Nothing hereinbefore contained shall preclude the officer receiving the application from holding a local inquiry in person, and from ordering the improvement to be registered, or refusing registration, in accordance with the result of the inquiry so held.

6. If an order refusing to register an improvement is passed by an officer lower in rank than the Collector of the district, such order shall not take effect until confirmed by the Collector of the district.

7. *Section 81 (1)*—Evidence relating to any improvement under this sub-section shall be recorded by the Revenue-officer specified in Rule 1 of this Chapter, who shall exercise the powers of a Civil Court in the trial of suits, and shall be guided by the provisions of sections 182 and 184 of the Civil Procedure Code.

CHAPTER IV.—RECORD OF PROPRIETORS' PRIVATE LANDS.

1. *Section 118.*—Applications under this section may be made to the Collector of the district, or to the officer in charge of the sub-division in which the land in question is situated, or to any Assistant or Deputy Collector specially empowered by Government to receive such applications. If the application is made to the Collector of the district, he may transfer it for disposal to any officer empowered by Government to receive it.

2. The application shall be signed by the party making it, and shall contain the following particulars, so far as the applicant is able to furnish them:—

(*a*) The name, *tauzi* number, and Government revenue of the estate.
(*b*) The names of the registered proprietors, and the share held by each.

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(*c*) The specification of each plot of land referred to in the application, showing the village in which it is situated and the area and boundaries of each plot, if known.

(*d*) The names of the tenants (if any) in occupation of each such plot.

(*e*) Grounds of the application.

3. On receipt of the application the officer shall make such inquiry as he may think fit, by examining the applicant or his agent, and may call for further particulars before ordering futher proceedings.

4. If the area of the lands has not been already ascertained by measurement made by competent agency under the authority of Government, or if for sufficient reason a further measurement is considered desirable, the officer shall order the lands to be measured, and shall estimate the cost of measurement in accordance with the rules for the time being in-force for the measurement of lands in partition cases, and shall require the applicant to deposit the amount, either at once or in such instalments as he may deem fit.

CHAPTER V.—Service of Notice.

1. *Sections 12, 13, 15 and 18.*—Notices under these sections shall contain, so far as may be possible, the particulars given in the forms specified in Schedule I, and shall be served, on the landlord or his agent, or, where two or more persons are joint-landlords, on their common agent, referred to in section 188, or on their common manager appointed under section 95, as the case may be in the manner prescribed for the service of a summons on a defendant under the Code of Civil Procedure.

Government Notification No. 3157 L. R., dated the 11th August, 1896.

Where there is more than one landlord, and no common agent or common manager has been appointed, the notice shall be served by being posted on the landlord's village office, if any, and, if there be no village office, by fixing it up, in the presence of not less than two persons, on some conspicuous place on the tenure, and a copy shall also be forwarded by post, in a letter registered under Part III of the Indian Post Office Act,* to the person or persons to whom immediately preceding the transfer the rent had ordinarily been paid.

The landlord's fee will be held in deposit in the Collector's office till applied† for by the landlord or some other person authorized on his behalf to receive it or to send it to him through peon.

The officer who will sign the notices shall intial the entry on account of the landlord's fee in the Deposit Register kept in the Treasury.

‡ *Board's Instructions.*

The description of tenure or *raiyati* holding to be entered in column 3 of the form of notices under sections 12 and 18, 13 and 18, and 15 and 18 of the Bengal Tenancy Act, prescribed in Schedule I and referred to in this rule, should, especially in the case of rent-fee tenures and holdings, be, if possible, sufficiently precise and full to enable the landlord to identify the lands referred to.

2. *Section 45* —Notice to a *raiyat* to quit under this section shall be served, through the Court having jurisdiction to entertain a suit for ejectment from the holding, in the manner prescribed for the service of a summons on a defendant under the Code of Civil Procedure, and shall be subject to the same process fee.

3. *Section 46* (*2*).—The agreement under this section shall be filed in the Court having jurisdiction to entertain a suit for arrears of rent of the holding, and shall be served on the *raiyat* in the manner prescribed for the service of summons on defendant under the Code of Civil Procedure, on payment of the fee prescribed by the High Court.

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* Act XIV of 1866 has been repealed and re-enacted by the Indian Post Office Act, 1898 (VI of 1898). See now Chapter VI of the latter Act.

† Applications or claims for the refund of landlord's fee held in deposit are liable to court-fee, under both clauses (a) and (b) of Article I of Schedule II of the Court-fees Act, of one anna when the amount claimed is less than Rs. 50 and of eight annas in other cases. When, however, the amount claimed does not exceed Rs. 25, and the application is made within three months of the date of deposit under Government of India's Notification No. 849, dated the 16th February 1833, published on page 122 of the Gazette of India of the 17th idem, no Court-fee is required—*Vide* Board's Circular Order No. 2 of June 1894.

‡ Circular Order No. 15 of March, 1900.

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4. *Section 46(4).*—The notice under this section shall be filed in the Court having jurisdiction to entertain a suit for arrears of rent of the holding, and shall be served on the landlord in the manner prescribed for the service of a summons on a defendant under the Code of Civil Procedure, on payment of the process fee prescribed by the High Court.

5. *Section 63 (2).*—In cases (*a*), (*b*) and (*d*) of section 61 herein referred to, the notice of the receipt of the deposit shall be served by forwarding the notice by post in a letter registered under Part III of the Indian Post Office Act, 1866,* or, where the Court may deem it necessary, in the manner prescribed for the serviee of a summons on a defendant under the Code of Civil Procedure.

6. *Section 72 (2)* —The general notice referred to in sub-section may be published by the transferee by fixing up a written notice to the tenants in the village office or, in the presence of not less than two persons, in some conspicuous place on the lands, and by proclaiming to the tenants by beat of drum, in every village to which the transfer extends, that the interest of the former landlord has passed to the transferee.

The transferee may, if he thinks fit, apply for service of the notice to the Civil Court having jurisdiction to entertain a suit for arrears of rent of the holding, and the Court shall thereupon serve the notice, as hereinbefore prescribed, on payment of the process fee prescribed by the High Court.

7. *Section 73.*—Notice under this section shall be in writing, and shall be delivered to the landlord or his agent, or, where two or more persons are joint-landlords to their common agent referred to in section 188, or to their common manager appointed under section 95, as the case may be, at the landlord's village office, or at such other convenient place as may be appointed by the landlord for the payment of rent under sub-section (2) of section 54.

8. The *raiyat* may, if he thinks fit, cause the notice to be served through the Civil Court having jurisdiction to entertain a suit for arrears of rent of the holding, in the manner prescribed for the service of a summons on a defendant under the Code of Civil Procedure, on payment of the process-fee prescribed by the High Court.

9. *Section 86 (2) and (4).*—If the *raiyat* elect to proceed under the second sub-section of this section, he may personally serve a written notice of his intention to surrender on his landlord; but, if he elect to proceed under the fourth sub-section of the section the notice of the *raiyat's* intention to surrender shall be served on the landlord in the manner prescribed for the service of a summons on a defendant under the Code of Civil Procedure, on payment of the process-fee prescribed by the High Court.

10. *Section 87.*—A notice of the tenant's abandonment of his holding, under sub-section (2) of this section, shall be in the form specified in Schedule I, shall be published by beat of drum upon the holding alleged to be abandoned, and a copy thereof shall be affixed, in the presence of not less than two witnesses to some dwelling-house or tree or other conspicuous object upon the holding. The fee payable by the landlord shall be Re. 1.

11. *Section 155.*—Notice to the tenant under this section shall be filed in the Court having jurisdiction to entertain a suit for arrears of rent of the holding, and shall be served in the manner prescribed for the service of a summons on a defendant under the Code of Civil Procedure, on payment of the fee prescribed by the High Court.

† CHAPTER VI.

Rules under section 189 of the Bengal Tenancy Act, VIII of 1885, as amended by Act III (B.C.) of 1898, as to the procedure to be followed by Revenue-officers in regard to the Record-of-rights and Settlement of Rents.

1. (*a*) Every Revenue-officer appointed by the Local Government under the designation of "Settlement-officer" or "Assistant Settlement-officer" for the purpose of making surveys, record-of-rights, settlement of rents, determination of pro-

* Act XIV of 1866 has been repealed and re-enacted by the Indian Post Office Act, 1898 VI of 1898. See now Chapter VI of the latter Act.

† As revised by Government Notification No. III-L. R., dated the 10th January 1899, published in Part I, page 33, of the *Calcutta Gazette* of the 11th idem.

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prietor's private lands, and such like proceedings, or any one or more of them, under the Bengal Tenancy Act, 1885, is hereby vested with all the powers exercisable by a Civil Court in the trial of suits, and with the powers mentioned in section 189 (1) (*b*) and (*c*) of the Bengal Tenancy Act, 1885.

(*b*) A Revenue-officer who, under the designation of "Settlement-officer," has been appointed by the Local Government for the purpose of making a survey and record-of-rights and settlement of rents under Chapter X of the Bengal Tenancy Act, 1885, shall have power to make over to any officer subordinate to him (who has been duly empowered, under the designation of Assistant Settlement-officer, to act as a Revenue-officer, under the provisions of the same Chapter of the same Act), (*i*) objections preferred under section 130A, (*ii*) the Settlement of fair rents (including the preparation of a table of rates), (*iii*) the preparation of a settlement rent-roll under Chapter X, Part II, of the Act in any area (*iv*) applications for the Settlement of fair rents under section 105, (*v*) suits instituted for the trial of disputes under section 106 of that Act.

(*c*) A Revenue-officer so appointed under the designation of Settlement-officer shall, on the application of any persons interested, and after giving notice to other persons interested, and hearing any objections preferred or, of his own motion, without giving such notice, have power to withdraw, from the file of any Assistant Settlement-officer subordinate to him, any of the matters Specified in Rule 1 (b) above, and to dispose of them himself, or to transfer them for disposal to any other Assistant Settlement-officer subordinate to him, who has been duly empowered to act as a Revenue-officer.

(*d*) On the application of either party to a suit under section 106, after giving notice to the other party and hearing any objections preferred, or, of his own motion, without giving such notice, a Revenue-officer so appointed under the designation of Settlement-officer may transfer to such competent Civil Court as the District Judge may designate the trial of a suit or of any class of suits instituted for the decision of a dispute or disputes with involve important and complicated questions of right and title or claims to be put in possession.

(*e*) In the case of an uninhabited village, any general notice to be served or publication to be made under the rules in this Chapter may be served or made in any inhabited village contiguous to that village, or, if there be no inhabited village contiguous to that village, in the inhabited village nearest to that villages, or in the village in which the tenants and occupants of the lands of the uninhabited village are believed by the Revenue-officer to reside.

2. Deputy Superintendents of Survey and Assistants Superintendents of Survey employed in operations under these rules are hereby declared to be Revenue-officers for the purpose of performing any duty imposed upon them by these rules, or by Instructions, consistent with these rules, issued by the Board of Revenue.

They are hereby vested with the powers specified in section 189 (1) (*b*): Provided that an Assistant Superintendent shall not exercise the powers vested in a Superintendent under the Bengal Survey Act.

Procedue for Cadastral Survey, Record-of-rights, and Settlement of Rents.*

3. The Processes will be—

I – Demarcation of boundaries.
II.—Measurement.
III.—*Khanapuri, i. e.*, preliminary preparation of the record.
IV.—Attestation of the record.
V.– Publication of the draft record.
VI.—Disposal of objections under section 103A.
VII.—Settlement of fair rents, in cases in which a settlement of revenue is being or is about to be made.

* The word "cadastral," according to the Dictionaire des Dictionaires is derived from the mediæval Latin word *capitastrum*, a public register, containing the quantity and value of landed property, names of owners, etc., which served for the assessment of the tax on property. According to orhers, the word is derived from the French word *cadrer* to square (*Ocean Highways*, Nov. 1872).

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VIII.—Final publication of the record-of-rights.

IX.—The settlement of fair rents on the application of the parties under section 105, and the trial of suits for the decision of disputes under section 106, in cases in which a settlement of revenue is not being or is not about to be made.

I.—Demarcation of Boundaries.

4. (*a*) In the demarcation of village boundaries, the area contained within the exterior boundaries of the village maps of the revenue survey shall be preserved, as far as possible, as the unit of survey and record.

(*b*) Where there is no dispute, the boundary of the village according to possession shall be followed, and, where that boundary does not differ substantially from the boundary of the revenue survey, the latter will not be separtely shown in the map.

(*c*) Where there is considerable difference between the boundary according to the revenue survey map and the existing boundary of the village as ascertained by the Revenue-officer, the latter shall be followed for the purposes of map and record; but the boundary of the revenue survey map shall also be marked on the new village map.

(*d*) Where there is dispute as to village boundaries, the Revenue-officer shall decide the dispute under the Bengal Survey Act, V (B. C.) of 1875.

(*e*) Where no revenue survey maps have been prepared, the Revenue-officer appointed under the designation of Settlement-officer is empowered to determine, after such local inquiry as he may consider necessary, and issue of notice of the inquiry to all parties concerned in the manner prescribed, the area to be included in the village; and such area shall be adopted as the unit of survey and record-of-rights.

(*f*) The notice under Rule 4 (*e*) of the inquiry to be held shall be given by proclamation and beat of drum and by posting it, in the presence of not less than two persons, in some convenient place or places in the lands to which it refers,

5. Boundary pillars of a permanent nature shall be erected at every point where the boundaries of three or more villages meet, and may be erected wherever the Revenue-officer considers it necessary to define by pillars the boundaries of estates or tenures or of lands which have been the subject of dispute.

II.—*Measurement.*

6. A field map of every village shall be prepared. It shall show the boundaries of every field separately held, or of such plot of land as the Instructions of the Board of Revenue for giving effect to these rules may lay down.

Board's Instructions.

The instructions of the Board are contained in Rule 30, Chapter 6 Part II, of the Survey and Settlement Manual, 1900.

III.—Khanapuri, i. e., *Preliminary preparation of the Record.*

7. The following are the principal documents to be preparad in the course of a survey and the preparation of a record-of-rights under Chapter X of the Bengal Tenancy Act, 1885:—

Village map.	*Khewat.*
Khasra.	*Khatian.*
Parchas.	*Terij*

These, and any other papers prescribed by the Board of Revenue, shall be prepared in such manner as the Board may prescribe.

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Board's Instructions.

General instructions have been given in Part II of the Survey and Settlement Manual, 1900, but special instruction in particular settlements may be issued with the approval of the Board.

8. The record-of-rights, which shall be published under section 103A of the Bengal Tenancy Act, 1885, shall be contained in the *khewat* and th *khatian*.

9. (*a*) The proprietary *khewat* shall show the character and extent of proprietary interests. It shall be first drawn up with reference to the registers maintained by the Collector under the provisions of the Land Registration Act, VII (B. C.) of 1876. As the record-writing proceeds, the proprietary *khewat* shall be altered in accordance with the facts of possession. The Settlement-officer shall, from time to time, under such instructions as the Board of Revenue may prescribe in this behalf, give information to the Collector of all alterations made in the *khewat*, and the Collector shall thereupon take action to make such corrections as may be necessary in his registers prepared under the Land Registration Act. If the Collector, after inquiry under the Land Registration Act, finds that any entry in the *khewat* is incorrect, a note shall be made in the *khewat* of his finding.

(*b*) A *khewat* may also, when the Revenue-officer thinks fit, be prepared to show the character and extent of the interests of tenure-holders, such of their interests as are of a *raiyati* nature being also recorded in the *khatian*.

Board's Instructions under Rule 9 (a)

The Instructions have been incorporated in Rule 13 of Chapter I, Part II, of the Survey and Settlement Manual, 1900.

10. (*a*) The k*hatian* shall show in detail for all the lands of the village, estate by estate, landlord by landlord, tenant by tenant, and occupant by occupant, the lands included in each estate owned by each landlord and occupied by each tenant or occupant, with particulars of rent and area and of the incidents of each tenancy.

(*b*) Lands cultivated or otherwise held direct by the proprietor shall be shown in detail in the *khatian*, and shall be entered either as proprietor's private land, or as land held by the proprietor but not private land in accordance with the provisions of Chapter XI of the Bengal Tenancy Act, 1885.

IV.—Attestation of the Record.

11. (*a*) When the map, *khasra*, *khewat*, and *khatian* for a village have been prepared in the manner prescribed by these rules and by Instructions of the Board of Revenue consistent with them, the Revenue-officer shall issue a notification, in such form* as may be approved by the Board, fixing a day, which shall be not less than a week from the date of publication of the notification, on which he will be present at some place to be specified at or near the village, for the purpose of attesting and completing the record-of-rights.

(*b*) The notification shall further state that on the day so fixed, or on any other day to which the proceedings may be adjourned, the Revenue-officer will record rents and status and deal with objections relating to entries in the record or omissions therefrom; and it shall require all parties interested in the subject-matter of the inquiry to attend at the time and place specified, with their *parchas*, and with such evidence as they have to offer in connection with the proceedings.

(*c*) Such notification shall be published by proclamation and beat of drum, and fixed up, in the presence of not less than two persons, in some conspicuous place in the village to which it refers.

Board's Instructions under Rule 11 (a).

The usual practice should be to allow one month's interval between the date of issue of the notification and the commencement of attestation. The prescribed form of the notification is contained in Appendix A to the Survey and Settlement Manual, 1900.

12. The Revenue-officer may also, if he deem fit, take such additional measures, under the powers conferred on him by Rule I of this Chapter, as he may deem de-

* *See* Form I *post*.

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sirable to procure the attendance, at the place specified in the notification issued under the last preceding rule, of the occupants, under-raiyats, raiyats, tenure-holders, landlords and proprietors, or their authorised agents.

13. On the date specified in the notification issued under Rule 11, or on any other date to which the proceedings may be adjourned, the entries which have been made in the *khewat* and in each *khatian* shall be read out in the presence of such of the interested parties as are in attendance.

If the correctness of any entry is questioned, the Revenue-officer shall dispose of the objection, after local inquiry or otherwise: provided that if the correctness of the measurement be objected to, and a fresh measurement be demanded, the Revenue-officer may require the cost of the re-measurement to be deposited.

If the measurement shows the original measurement to have been inaccurate, the amount deposited, or any portion of it, may, if the Revenue-officer thinks fit, be refunded to the objector.

14. The Revenue-officer shall ascertain what *raiyats* claim the right to hold at fixed rates or fixed rents, explaining, as far as may be necessary, the provisions of the Bengal Tenancy Act, 1885, in this respect.

If the right claimed is disputed by the landlord, the Revenue-officer shall call on the claimants for proofs of such right.

It is sufficient for the claimant to establish the presumption mentioned in section 50 (2); and, if that presumption be not rebutted by the landlord, the claimant shall be recorded as a *raiyat* at fixed rates of rent, or a fixed rent, as the case may be.

15. The Revenue-officer shall ascertain which of the *raiyats* are settled *raiyats*, or occupancy *raiyats*, and the case may be, and shall record them as such, having regard to the presumption of section 20 (7) of the Bengal Tenancy Act, 1885.

16. The Revenue-officer shall ascertain what *raiyats* are non-occupancy, and to this end he shall be entitled to call upon the landlord or his agent to produce a statement showing the names or the *raiyats* alleged by him to be non-occupancy *raiyats*.

On the production of such statement, the Revenue-officer shall explain to the *raiyats* whose names are entered in the statement, and who have not already been recorded as occupancy or settled *raiyats*, the nature of the presumption raised by section 20 (7) of the Bengal Tenancy Act, 1885.

If, after such explanation, a *raiyat* admits himself to be non-occupancy *raiyat*, he shall be recorded as such.

If he does not admit himself to be a non-occupancy *raiyat*, the Revenue-officer shall call on the landlord to prove the allegation made by him regard to such *raiyat*.

17. *Abwabs* shall not be recorded. Cesses which are authorized by law shall be recorded separately from the rent in the *khatian*.

18. The Revenue-officer shall summarily ascertain the tenant's present rent and and record it in the appropriate column of the *khatians* as the rent payable in respect of the land held by the tenant.

19. When the record-of-rights and of exsisting rents has been prepared and attested in the manner prescribed in Rules 11 to 18, and when the record shall have been arranged and corrected in accordance with the orders which the Revenue-officer may have passed, he shall record a proceeding in which he shall state that attestation of the records of the village has been completed, and shall then cause the draft record-of-rights to be published in the village in the manner provided in Rule 20.

V. - Publication of the Draft Record.

20. (*a*) As soon as the record-of-rights has been prepared and attested, a notice* shall be posted up at the landlord's office in the village or, in the presence of not less than two persons, in some conspicuous place in the village, stating that the draft of the record will be published in the village on a day to be specified, not less than a week from the date of the posting of such notice, and calling on all persons interested to attend on the date so specified: provided that the draft of the record shall not be published until the proceeding under Rule 19 has been recorded.

* For form of notice, *see* Form II *post*.

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(*b*) On the date fixed for the publication of the draft record, the Revenue officer shall either proceed to the village himself and read the contents of the record in the presence of the parties who attend, or he shall depute an officer, not below the rank of *kanungo*, who shall read out the contents of the record in the presence of as many of the parties as attend, and the Revenue-officer, or officer deputed by him, as the case may be, shall at the same time inform the parties who attend that the draft record will be open for inspection for not less than one month in the office of the Revenue-officer, or in such other convenient place as the Revenue officer may determine. The Revenue-officer shall receive and consider any objection* which may be made to any entry during the period named.

Board's *Instructions under Rule* 20(*b*).

In the case of large settlements or when a large estate is concerned, the Revenue-officer shall allow the draft record to remain open to inspection for a longer period than one month, and should receive and consider objections preferred within such period.

VI.—Disposal of Objections under section 103*A*.

21. When an objection is made, within and before the expiry of the period of publication of the draft record prescribed under Rule 20 (*b*), regarding the correctness of an entry, or as to the propriety of any omission, notice† of the objection shall be served on all persons whose interests may, in the opinion of the Revenue-officer, be affected thereby, and they shall be called upon to attend at such time and place as the Revenue-officer may fix for the disposal of the objection.

If no person attends to contest the objection, the objection may be allowed and the record amended arcordingly, or the person who made the objection may, if the Revenue-officer thinks fit, be called upon to produce evidence in support of his objection.

All such objections shall be dealt with summarily under such Instructions as the Board of Revenue may prescribe.

Board's *Instructions.*

This Instructions is contained in Rule 2 of Chapter 5, Part III, of the Survey and Settlement Manual, 1900.

VII.—Settlement of Fair Rents in cases in which a Settlement of Revenue is being, or is about to be, made.

22. (*a*) In the case of a settlement of fair rents under Part II of Chapter X of the Bengal Tenancy Act, 1885, when a settlement of revenue is being, or is about to be, made, the Revenue-officer shall serve a notice by proclamation and beat of drum, and by posting it, in the presence of not less than two persons, in some conspicuous place in the village comprising the lands under settlement.

The notice shall be in such form‡ as may be approved by the Board of Revenue, and shall set forth that on a date named and at a place named the Revenue-officer will settle fair rents in respect of all estates, tenures or holdings, and for unsettled lands included in such village.

A schedule may, when the Revenue-officer thinks fit, be appended to the notice giving such particulars as he may think necessary relating to the names and numbers of all estates, tenures and holdings paying revenue or rent to Government, and of unsettled lands for which rent will be settled.

Such notice shall be served at least one week previous to the date fixed for settlement of fair rents.

When such notice has been served it shall be held that all persons have, subject to the provisions of Rule 30 (*b*), been sufficiently warned of the date fixed:

(*b*) Provided that, in cases in which a table of rates is prepared under the provisions of section 104B, the notice shall not be published until the table of rates has been confirmed under sub-section (5) of that section.

Board's *Instructions under Rule* 22 (*a*)

The prescribed form is contained in Appendix A of the Survey and Settlement Manual, 1900.

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* For form for putting in objections, *see* Form III *post*.
† For form of notice fixing date for hearing of objection, *see* Form IV *post*.
‡ For from of notice, *see* Form V *post*.

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23. A table of rates shall not ordinarily be prepared when it is found that the tenants of the local area in question hold their lands at lump rentals, and no rates actually exist, or when the rates are so numerous and varied, and are so little dependent on the class of soil that no table of existing rates can be prepared.

When the above conditions do not obtain, and it is possible to prepare, a table of existing rates which are generally of a uniform character and in accordance with certain acertainable classes of soil, a table of rates may be prepared in accordance with the provisions of section 104 A (*c*):

Provided that when the Revenue-officer is of opinion, for reasons to be recorded by him in writing, and submitted to, and approved by the authority empowered to confirm the table of rates, that the rents stated as the existing rent by the landlord and tenants are not the rents that are legally payable, and that it is impossible to ascertain those rents, a table of rates fairly and equitably payable may be prepared and shall be based on the rates or rents payable in those neighbrouring villages, the lands of which are fairly comparable with the lands of the village.

24. When the Revenue-officer has decided to settle rents in any local area on the basis of a table of rates, under section 104 A (*c*), he shall first prepare a table of existing rates and shall then either maintain those rates or shall proceed to enhance or reduce them, having regard to the general principles laid down in the Bengal Tenancy Act, 1885, for the enhancement or reduction of rents, and especially to section 30 (*b*), (*c*) and (*d*).

25. The table of rates finally prepared by the Revenue-officer and published by him under section 104B (2), shall contain the particulars noted in section 104B (1), and shall show—

(*a*) the classes of land as locally known, that have been adopted in the fixation of rates;
(*b*) the area, expressed in local measure, for which each rate is fixed;
(*c*) the existing rates, if any, taken as the basis of the table of rates; and
(*d*) the rates fixed as fairly and equitably payable, for that area of land of each class of land for each class of tenant whose rent is liable to alteration.

26. (*a*) When a table of rates has been prepared under section 104B, a notice* shall be posted up on in the landlord's office in the village or, in the presence of not less than two persons, in some conspicuous place in the village, stating that the table of rates will be published in the village on a day to be specified, not less than a week from the date of the posting of such notice, and calling on all persons interested to attend on the date so specified.

(*b*) On the date fixed for the publication of the table of rates the Revenue-officer shall proceed to the village and shall explain, to so many of the parties as attend, the proposed rates and the grounds on which they are based, and shall hear and consider any objections that may be raised to any entries in the table.

He shall at the same time inform the parties who attend that the table of rates will be open to inspection for not less than one month in the office of the Revenue-officer, or in such other convenient place as the Revenue-officer may determine, and that any person who objects to any entry in the table of rates may present a petition to him on the subject, within one month of the date of the publication of the table of rates, which will be duly considered under section 104B (3).

27. The Revenue-officer shall record the grounds of his final order in every case in which he disposes of an objection to a table of rates under section 104B (4).

28. In submitting his proceeding to the confirming authority under section 104B (4), the Revenue-officer shall describe the land classification adopted by him for the table of rates and shall show in tabular form rates which were found by him to exist for the classes of land described, and the rates he proposes to substitute for the existing rates, explaining in each case his grounds for maintaining enhancing or reducing the rates.

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* For form of notice, see Form VI *post*.

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29. (*a*) The following Revenue-authorities are empowered under section 104B (4) to confirm tables of rates prepared under Bengal Tenancy Act :—

(*i*) when the total rents to which the table of rates is to be applied will not, in the opinion of the Revenue-officer, exceed Rs. 5,000, the Commissioner of the Division ;

(*ii*) when the total rents in question will, in the opinion of the Revenue-officer, exceed Rs. 5,000, the Board of Revenue.

(*b*) The following Revenue-authorities are empowered, under section 104B (4), to confirm settlement rent-rolls prepared under the Bengal Tenancy Act :—

(*i*) in all cases in which the settlement rent-roll has been prepared by an Assistant Settlement-officer, and the Settlement-officer is of the rank of a Collector, the Settlement-officer ;

(*ii*) in all other cases the Collector or other Revenue-authority to whom the Settlement-officer is declared by the Board of Revenue to be immediately subordinate.

30. (*a*) On the date fixed in Rnle 22 above, or on any subsequent date to which the proceedings may be adjourued, the Revenue-officer shall read, or cause to be read aloud in his presence, the name of each tenant whose rent has to be settled, the area of his tenancy, and the existing rent, and shall proceed to settle a fair rent for every such tenant under the provisions of section 104A (1), (*a*), (*b*), (*d*) or section 104C :

(*b*) Provided that, when a Revenue-officer praposes to alter an existing rent, and the parties have not attended in compliance with the general notice prescribed in Rule 22 above, the Revenue-officer shall serve each person interested with a special notice, and the fair rent shall not be settled in the absence of such person until after due service of such special notice has been proved.

31. The settlement rent-roll shall contain the particulars prescribed in section 164A (2), and the fair rent settled for each tenant shall be entered in it by the Reveue-officer himself at the time that such rent is settled.

32. As soon as the settlement rent-roll has been prepared, it shall be published* in the manner prescribed for the publication of the draft record in Rule 20 ; and the Revenue-officer, or the officer deputed by him to read out the contents of the settlement rent-roll, as the case may be, shall at the same time inform the parties who attend that the settlement rent-roll will be open to inspection for not less than one month in the office of the Revenne-officer, or in such other convenient place as the Revenue-officer may determine, and that any person who objects to any entry in the settlement rent-roll or omission therefrom may present a petition to the Revenue-officer on the subject within one month of the date of the publication of the settlement rent-roll, which will be duly considered under section 104E.

33. All objections presented under Rule 26 or Rule 32 shall be dealt with in accordance with the provisions of Rule 21, in the same way as objections presented under section 103A.

An appeal presented under section 104G (1) shall lie to the officer to whom the Revenue-officer who has passed the order appealed against is immediately subordinate :

Provided that a second appeal shall lie from any order on appeal settling the amount of a fair rent passed by a Settlement-officer or Collector under this rule to the Commissioner of the Division, and that, when the proposal annual rental of any tenancy exceeds 100 rupees per annum, a final appeal shall, in all such cases, lie to the Board of Revenue.

34. As soon as the settlement rent-roll has been sanctioned by the confirming authority, it shall be incorporated in the record-of-rights by the entry of the fair rents settled in a column of the *khatian* to be set apart for that purpose.

VIII.—Final publication of the Record-of-rights.

35. When all objections under section 103A have been disposed of as provided for in Rule 21 above, and, in cases in which a settlement of revenue is being, or is

* For form of notice for publication of the settlement rent-roll, *see* From VII *post*.

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about to be, made, the settlement rent-roll has been incorporated in the record-of-rights, as provided in Rule 34, and the Revenue-officer has corrected the draft record in accordance with the orders passed by him on such objections or in the course of the preparation of the settlement rent-roll, he shall finally frame the record and cause it to published* by notifying that its contents will be read out in the village on a date to be specified, not less than a week from the date of the publication of such notice, and by reading it out himself or causing it to be read in the village on the date so specified, in the manner prescribed in Rule 20, in the presence of the parties or of as many of them as attend.

IX.—The settlement of fair rents on the application of the parties under section 105, and the trial of suits for the decision of disputes under section 106 in cases in which a settlement of revenue is not being, or, is not about to be, made.

36. When the landlord or tenant applies for the settlement of a fair rent, he shall be considered as plaintiff and the opposite party as defendant, and the Revenue-officer shall proceed as is directed in Rule 37 to Rule 42 following.

37. When the estate or tenure is managed by the Court of Wards and a settlement of revenue is not being, or is not about to be, made, the procedure laid down in these rules for recording or settling rents shall be followed, the Manager of the estate or the tenure being regarded as the landlord.

38. When a landlord or tenant applies for the settlement of a fair rent, notice† shall be served on every person interested in the application, together with a copy of the application, or extract therefrom, or summary thereof, so far as the application concerns such person.

Board's Instructions.

If only one person is interested in the application, a copy should be served on him: if more than one, an extract containing such particulars as concern him shall ordinarily be served upon each person. If a summary only if given, the Revenue-officer should satisfy himself that such summary contains all that is material for the parties interested to be informed of.

39. With the consent of the Revenue-officer, any number of tenants occupying land under the same landlord in the same village may make a joint application for the settlement of rents, or may be joined as defendants in the same proceeding on a similar application by the landlord:

Provided that if at any time it shall appear to the Revenue-officer that the question between any two of the parties of whom one is so joined with others cannot conveniently be so jointly tried he may order a separate trial to be held of that question, or he may pass such order, in accordance with the Civil Procedure Code, for the joint or separte disposal of the application, as he may think fit.

40. (*a*) On the date fixed for the settlement of fair rents, or any subsequent date to which the proceedings may be adjourned the Revenue-officer shall read aloud, or cause to be read aloud in his presence, the name of each tenant whose rent has to be settled, the area of his tenancy, and the existing rent, and shall then proceed to settle a fair rent under the provisions of section 105.

(*b*) Where landlord or tenant does not attend, after due service of notice has been proved, the procedure may be *exparte*.

(*c*) Where landlord or tenant appears, and the fair rent is not settled under sub-section (5) or (6) of section 105, that is, by the acceptance by the parties of a rent proposed by the Revenue-officer, or compromise, the Revenue-officer shall record evidence in the manner prescribed in clause (*f*) of section 148 of the Bengal Tenancy Act, 1885, for the trial of rent-suits, and shall settle a fair and equitable rent according to law: provided that in important cases the Revenue-officer may, in his discretion, record evidence at length.

(*d*) When a fair rent has been settled under these rules, it shall be entered in the *khatian* as the rent payable in respect of the holding from the date prescribed by section 110.

* For form of notice, *see* Form VIII *post*.
† For form of notice, *see* Form IX *post*.

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41. It shall not be necessary for a Revenue-officer to draw up a separate decree with regard to the fair rent settled; but the entry made in his decision or schedule attached thereto with regard to the fair rent settled shall be held to be decree.

42. Proceedings under section 106 of the Bengal Tenancy Act, 1885, shall be dealt with in all respects as suits between the parties.

Supply of copies of the Record-of-rights to Parties interested.

43. (*a*) The Revenue-officer, having completed the record, shall cause copies of it to be made, one of which, or extracts from which, will be made over to the landord concerned, or, where there are more landlords than one, to their common manager, as the case may be, or, if there be no common agent or common manager, to such person among the landlords as the Revenue-officer may think fit, and one to the Collector of the district.

(*b*) An extract from the *khatian* relating to his tenancy shall be given to every tenant under the seal of the Revenue-officer and under the signature of an officer duly authorized by the Revenue-officer to give copies.

(*c*) Copies of records, or of extracts from them, supplied to landlords and tenants under this rule shall be given free or on payment according as in the case of each local area the Local Government may direct. When payment is required, the sums so recovered shall be adjusted against the expenses incurred on account of survey and settlement.

Final Reports.

44. The Local Government may, if it thinks fit, direct that a final report be written in English for each village and each local area under survey. The report for the village will show—

(*a*) the number of tenants of each class, with the area held and rental paid by them;
(*b*) the area and classification of the village lands;
(*c*) the rental before settlement, and according to settlement, and the number of fair rents settled, with explanation of increase or decrease;
(*d*) when settlement of land revenue is being made, the amount of Government revenue, before and after resettlement, grounds of assessment, and comparison of gross assets with new assessment;
(*e*) the rates of rent prevailing before settlement, and the rates settled, if any;
(*f*) proximity to markets, and facilities for irrigation;
(*g*) village customs, including customs as to payment of village officials;
(*h*) arrangements made for maintenance of records;
(*i*) other matters deserving of notice which have been excluded from the record-of-rights.

The report for the whole area under survey will contain the following particulars:—

I.—General description of the tract.
II.—Its fiscal history.
III.—Statistical results.
IV.—Comparison of condition of the tract, as regards rentals, before and after survey.
V.—Financial results, including approximate division of expenses under the heads—
(*a*) Survey.
(*b*) Record-of-rights.
(*c*) Preparation and distribution of records.

Board's Instructions.

The report should also show the custom regarding the transferability or otherwise of occupancy right. Mention should also be made of any illegal *abwabs* which have been found to be in existance before the preparation of the record-of-rights, but which were struck off.

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Applications under section 103 for the record of particulars specified in section 102 in estates or tenures.

45. These applications shall be made to the collector of the district.

46. The application shall specify—

(*a*) the status of the applicant, *viz.*, whether he is a proprietor or a tenure-holder;

(*b*) the particulars specified in section 102, Bengal Tenancy Act, in respect of which the application is made.

Board's Instructions.

The particulars which can be ascertained in these proceedings are those which are specified in section 102. An application for settlement of fair rents, or for the record of proprietary interests or of proprietor's private lands, under Chapter XI of the Act, is not admissible under section 103.*

(*c*) The number of tenants occupying the estate or tenure or part thereof in respect of which the application is made, the total rent payable by them at the time, and the estimated area covered by the application (so far as the applicant is able to give these particulars).

47. (*a*) If the application is made by a proprietor, it shall not be admitted unless the name of the applicant and the extent of his interest are registered under Act VII (B. C.) of 1876.

(*b*) If the application is made by a tenure-holder, it shall not be admitted unless the right of the tenure-holder and the extent of his interest is admitted by the superior landlord or is proved to the satisfaction of the Collector.

48. On receipt of the application, the Collector shall forward it to the Commissioner with any remarks which he may think necessary.

49. The Commissioner may call for further information, or may require the application to be amended.

50. If the Commissioner considers that the application cannot be granted with advantage to the interests of all persons concerned, he may reject it. If he approves it, he shall forward the application, with an expression of his opinion, for the orders of the Board of Revenue.

51. A Commissioner rejecting an application shall record his reasons for doing so, and the applicant, if dissatisfied with the order, may appeal within one month to the Board of Revenue.

52. When an application is referred to the Board under Rule 50, or an appeal is preferred under Rule 51, the Board may call for further information, if necessary, and shall pass such orders as it may think fit for allowing or rejecting the application.

53. As soon as an application is allowed, the Collector shall call upon the applicant to deposit eight annas per acre of the estimated extent of the estate or tenure or part thereof in respect of which the application has been allowed. If the Collector is unable to estimate the area, he shall require a deposit at the rate of Rs. 2 for each tenant. If the amount does not exceed Rs. 500, the applicant must deposit the whole amount in advance. If it exceeds Rs. 500, the applicant shall deposit the sum of Rs. 500, and shall give such security as the Collector may require for the payment of the balance of the deposit in such instalments as the Collector may from time to time demand.

If the amount deposited as above proves more than sufficient to cover the cost of the proceedings, the unexpended balance will be refunded on their termination.

If the amount deposited proves insufficient to cover the cost, the applicant shall, when required by the Collector, deposit, from time to time, such further sums as the Collector may think necessary for the completion of the proceedings. If he shall fail to do so, the proceedings may be stopped and the order allowing the application cancelled.

* This instruction was issued by the Board of Revenue before the publication of the High Court's ruling in the case of Dharani Kanta Lachiry Chowdari v. Gohar Ali Khan, 7 C. W. N., 33, as to which see notes under section 103, *ante*.

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Board's Instructions.

The collector should report such cases to the Commissioner, who will pass the final order cancelling the application.

54. Revenue-officers deputed to carry on proceedings under section 103 are hereby vested with the powers mentioned in section 189 (*a*) and (*b*).

Board's Instructions.

1 Under Notification No. 1007T. R., dated the 5th July 1901, published at page 880, Part I, of the *Calcutta Gazette* of the 10th idem, all Deputy Collectors are by virtue or their offices vested with the powers of a Revenue-officer under section 103, Bengal Tenancy Act.

2. It has been held by the Advocate-General that section 103, Bengal Tenancy Act, does not empower a Revenue-officer to make a survey or prepare a record-of-rights, within the meaning of section 101 of the Act, in accordance with the procedure laid down in sections 103A and B. Nor is a Revenue-officer, acting under section 103, empowered to settle fair rent under section 105 or to decide disputes under section 106. The remaining sections of Chapter X, *viz.*, 107—115, do not, according to the same authority, apply to proceedings under section 130. Such proceedings are regulated by the following rules made by the Local Government in accordance with the provisions of that section.*

55. If the application be for the ascertainment and record of all the particulars mentioned in section 102, a record similar to the record-of-rights described in Rule 8 above shall be prepared, and the Revenue-officer shall follow the procedure prescribed in Rules 4—19 above, except so far as such procedure relates to the record of proprietary interest or the record of proprietors' private lands under Chapter XI of the Bengal Tenancy Act.

If the application is for the ascertainment and record of some only of the particulars specified in section 102, the Revenue-officer shall ascertain and record the particulars in such manner as may be most convenient, and shall follow, so far as necessary, the rules above referred to.

56. When the particulars, for the ascertainment of which the proceedings have been instituted, have been ascertained, the Revenue-officer shall prepare a draft record and publish it. For this purpose he shall follow the procedure laid down in Rule 20 above, and he shall receive and dispose of objections in accordance with the procedure laid down in Rule 21 above.

57. When all objections have been disposed of as provided for in the preceding rule, the Revenue-officer shall correct the draft record in accordance with the order passed by him, and finally frame the record and shall endorse on it a certificate that it has been duly prepared in accordance with the preceding rules.

58. The Revenue-officer, having finally prepared the record, shall cause it to be published in accordance with the procedure laid down, in Rule 35 above. He shall also cause a copy of it to be made for the applicant under section 103, and shall make it over to him. An extract from the record relating to his interest shall also be given to each tenure-holder and raiyat in the estate or tenure.

The final copy of the record, and of the map, if prepared, shall be deposited in the office of the Collector of the district.

CHAPTER VII.—General Scale of Fees.

1. *Section 189 (1).—For service of Notices.*—For the service of every notice under this Act, not being a notice issued by any Revenue of Civil Court (fees for serving which are regulated by the Court-fees Act), and not being provided for by any other rule made under this Act, a process-fee of annas 12 shall be levied, if the notice be directed to one or more persons residing in the same village.

2. Where such notices are directed to several persons resident in different villages, a fee of 12 annas shall be levied for service in each village.

3. In addition to the above fee, the actual charge which must be incurred, if it is necessary to travel by railway or boat, or cross ferries, will be levied from and paid by the person at whose instance the process is issued, before issue of the process.

* But see notes to section 103, *ante*

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If a peon carries more than one process involving charges for railway-fare, boat-hire, &c., the sum leviable will be charged, in equal shares, upon all the processes so carried.

The rates at which such boat-hire is to be charged shall be the same as those fixed for criminal processes under Rule VII of the rules prescribed by the High Court under clause 2, section 20, Act VII of 1870, and shall be sufficient only to cover, on the whole, the actual necessary to maintain for the purpose of serving processes of these classes.

4. If a peon is detained at the place of service for more than 24 hours at the request of the person at whose instance the process was issued, or of his agent, such person or agent must then and there pay demurrage at the rate of 5 annas a day. Unless this demurrage is paid the peon must decline to wait. No demurrage is to be charged if the delay was not due to the person requiring the processes or to his agent.

5. *Section 61 (2).—For deposits of Rent.*—For deposits of rent under section 61 (2) 4 annas for every such deposit of Rs. 25 or less, with an additional 4 annas for every Rs. 25 or part of Rs. 25, in excess; Provided that in no case shall the fee exceed the sum of Rs. 5.

6. *Section 134.—For Distraint of Crops.*—The following scale of charges is prescribed, on account of processes for distraint and sale under the Bengal Tenancy Act:

(*a*) In respect of the warrant of distraint—8 annas.

(*b*) In respect of each man necessary to effect the distraint and also to ensure safe custody, where such man is to be left in actual possesion—4 annas a day.

(*c*) In respect of action taken under section 126 (clause 2) for the reaping, storing or preservation of the crop distrained—4 annas a day for every person employed, and in addition actual hire of threshing-floor or store-house, if necessary.

In addition to the charges under clauses (*a*), (*b*) and (*c*) above railway-fare, boat-hire, and ferry charges will be levied, when necessary as under Rule 3 of this Chapter.

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SHEDULE I.

* Notice under Sections 12 and 18, Act VIII of 1885.

(See Rule 1 Chapter V, of the above Rules.)

TO

THE COLLECTOR OF

LET this notice be served on A.B., resident of , as required by $\frac{12}{18}$ section Act VIII of 1885. The landlord's fee of Rs. , with process-fee of Rs. , is forwarded herewith.

Government Notification No. 3157 L.R. dated the 11th of August 1896.

C. D. *Registering officer.*

To

A. B. resident of

TAKE notice that the transfer of the tenure [or *raiyati* holding at fixed rates (as the case may be)] specified below, of which you are alleged to be the landlord, has been registerd, and that the landlord's fee of Rs. will be held in deposit in the Collector's officer till applied for by you, or some person authorised on your behalf to received it. The amount stands to your credit, and will be paid to you, sent to you through peon, or trainsferred to your revenue account, on appllication:-

Tauzi number of estate.	Name of estate.	Description of tenure or raiyati holding at fixed rates transferred, with village and pargana in whichsituated.	Annual rent of tenure or raiyati holding at fixed rates.	Name, father's name, and residence of transferor of tenure or *raiyati* holding at fixed rates.	Name, father's name, and residence of transferee of tenure or *raiyati* holding at fixed rates.	Nature of transfer.	Date of registration of transfer.	Amount of landlord's fee.	Remarks.
1	2	3	4	5	6	7	8	9	10
								Rs. A. P.	

C. D., *Registering Officer.*

ORDERED that this notice be served on the above-named landlord.

E. F., *Collector.*

RECEIVED a copy of the above-mentioned notice.

Landlord.

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* In Government Order No. 1193P.D., dated 4th October 1900, to the address of the Inspector-General of Registration (received at the Board's Office with Government No. 1193½ P.D., of the same date), Government approved the printing of Form B, given in Rule 24 of the Revised Rules for the Registration of Documents under the Bengal Tenancy Act, published under Notification No. 949P., dated 21st March 1898, on the back of this form (Board's Miscellaneous Form No. 319).

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REVERSE OF THE FORM.

Details of the Peons' charges, &c.

Serial number of *challan*.	Number of notice.	Name of deposit.	Name of person to whom to be served, and details of peon's charges, &c.	Amount.
1	2	3	4	5

Notice under sections 13 and 18, Act VIII of 1885.

(See Rule 1, Chapter V, of the above Rules.)

In the Court of the *of*

To

THE COLLECTOR OF

LET this notice be served on A. B., resident of as required by section $\frac{13}{18}$, Act VIII of 1885. The landlord's fee of Rs. with process-fee of Rs. , is forwarded herewith.

C. D.,
Judge.

To

A. B., resident of

TAKE notice that the sale of [or the decree or order absolute for the foreclosure of mortgage on (as the case may be)] the tenure or *raiyati* holding at fixed rates, specified below, of which you are alleged to be the landlord, has been confirmed or made and the landlord's fee of Rs. will be held in deposit in the Collector's office till applied for by you, or some other person authorised on your behalf to receive it.

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The amount stands to your credit, and will be paid to you, sent to you through peon, or transferred to your revenue account on application :—

Tauzi number of estate.	Name of estate.	Description of tenure or *raiyati* holding at fixed rates transferred, with village in *pargana* in which situated.	Number of execution case, and names of parties.	Name, father's name, and residence of person whose interest in the tenure or *raiyati* holding at fixed rates has been sold or foreclosed.	Name, father's name, and residence of purchaser of tenure or *raiyati* holding at fixed rates.	Date of confirmation of sale or the decree or order absolute for foreclosure.	Amount of landlord's fee.	Remarks.
1	2	3	4	5	6	7	8	9
							Rs. A. P.	

C. D.,
Judge.

ORDERED that this notice be served on above named landlord.

E. F.,
Collector.

RECEIVED copy of the above-mentioned notice.

A. B.

Notice under sections 15 and 18, Act VIII of 1885.

(See Rules 1, Chapter V, of the above Rules.)

To

THE COLLECTOR OF

BE pleased to cause this notice to be served on A. B., resident of . The landlord's fee of Rs. , with process fee of Rs. , is deposited herewith for payment to the said A. B.

C. D.,
Tenure-holder or raiyat holding at fixed rates.

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To

A. B,. resident of

TAKE notice that I have succeeded to the tenure [or *raiyati* holding at fixed rates (as the case may be)] specified below, of which you are the landlord. The landlord's fee of Rs. will be held in deposit in the Collector's office till applied for by you, or some other person authorised on your behalf to receive it. The amount stands to your credit, and will be paid to you, sent to you through peon or transferred to your revenue account, on application :—

Tauzi number of estate.	Name of estate.	Description of tenure or *raiyati* holding at fixed rates succeeded to, with village and *pargana* in which situated.	Annual rent of tenure or *raiyati* holding at fixed rates.	Name, father's name, and residence of late tenure-holder or *raiyati* holding at fixed rates.	Date, if known, of death of deceased tenure-holder or *raiyati* holding at fixed rates.	Name, father's name and residence of successor tenure or *raiyati* holding at fixed rates.	Nature of successor's title to succeed.	Amount of landlord's fee.	REMARKS.
1	2	3	4	5	6	7	8	9	10
			Rs.					Rs. A. P.	

C. D.,
resident of

ORDERED that this notice be served on the above-named A. B.

E. F.,
Collector.

RECEIVED copy of the above-mentioned notice.

B. A.

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Notice under section 14, Act VIII of 1885.

In the Court of the *of*

To

THE COLLECTOR OF

IT is hereby notified to you that the tenure, * the particulars of which are entered below, was sold on the date specified below in execution of a decree for arrears of rent due in respect thereof :—

* Or raiyati holding at fixed rates.

Tauzi number of estate.	Name of estate.	Name of landlord of estate.	Address of landlord.	Description of tenure sold, with village or pargana in which situated.	Number of execution case, and names of parties.	Name, * father's name, and residence of person whose tenure has been sold.	Name, father's name, and residence of purchaser of tenure.	Date of confirmation of sale.	REMARKS.
1	2	3	4	5	6	7	8	9	10

C. D.,
Judge.

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Application under section 80, Act VIII of 1885.

(See Rule 1, Chapter III, of the above Rules.)

To

THE COLLECTOR OF

The application of , son of , resident of , for registration of an improvement under section 80 of the Bengal Tenancy Act, VIII of 1885.

Name of pargana and estate in which improvement has been effected.	Name of village in which improvement effected.	Nature of applicant's interest in land.	Nature of improvement.	By whom executed and at whose expense.	When executed.	Names of tenants benefited, if not more than five in number.
1	2	3	4	5	6	7

A. B.,
Landlord.

Notice under section 87, Act VIII of 1885.

(See Rule 10, Chapter V, of the above Rules.)

To

THE COLLECTOR OF

WHEREAS the holding mentioned below, and hitherto held by C. D., resident of , has been abandoned by him without notice to me and without arranging for the payment of the rent thereof, I hereby notify that I have treated the holding as abandoned, and that I am about to re-enter upon it accordingly.

Dated —— *Landlord.*

Schedule of Property.

Name of village and pargana in which situate.	Area and boundaries of holding.	Rent of holding.
1	2	3

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I.—Notice of Date of Attestation of the Records.

[*See Rule II* (a), *Chapter VI, of the Tenancy Act Rules and Part III, Chapter 3, Rule 9, of the Survey and Settlement Manual, 1900, and its Appendix A, Form No. 1.*]

NOTICE to the proprietors, tenure-holders, landlords, *raiyats*, under-*raiyats*, and occupants of—

Village , | *Thana* ,
Pargana , | District :

Take notice that under the powers vested in me by the Bengal Tenancy Act, VIII of 1885, and the Rules made thereunder, I shall, on the day of 190 , at , proceed to attest and complete the record-of, rights in the above-mentioned village.

You are hereby required to attend before me at the above-mentioned time and place, or at any other time and place to which the proceedings may be adjourned, and to produce such evidence, written or oral, as you may have to offer on the subject-matter of the proceedings.

Revenue-officer.

II.—Notice for Draft publication of the Record.

[*See Rule 20 (a) Chapter VI, of the Tenancy Act, Rules, and Part III, Chapter, 4, Rule 2, of the Survey and Settlement Manual, 1900, and its Appendix A, Form No. 2.*]

NOTICE to the proprietors, tenure-holders, landlords, *raiyats*, under-*raiyats* and occupants of—

Village , | *Pargana* ,
Thana , | District . :

Take notice that, as the attestation of the records of the above-mentioned village has been completed, the draft record will be published by its contents being read out in the village on the . All persons interested are called on to attend on this date.

Revenue-officer.

III.—Objection under section 103*A of the Bengal Tenancy Act.*

[*See Rule 20* (b), *Chapter VI, of the Tenancy Act, Rules, and Part, III, Chapter 5, Rule, 1, of the Survey and Settlement Manual, 1900, and its Appendix A, Form No. 3.*]

Village.

Thana.

District.

Name of objector, with father's name, caste and address.

Name, father's name, caste and address of person in whose *khatian* the entry objected to has been made, and number of *khatian*, if known.

Statement of entry objected to, with details of objection.

Statement of relief sought.

Signature of objector, with date of filing.

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IV.—Notice fixing the date for the hearing of an objection under section 103A of the Bengal Tenancy Act.

See Rule 21, Chapter VI, Bengal Tenancy Act Rules, and Part III, Chapter 5, Rule 2, of the Survey Settlement Manual, 1900, and its Appendix A, Form No. 4.

By order of the Settlement-officer at
District

CASE NO. OF 190 .

IN THE COURT OF

Objector.

Notice to

WHEREAS an objection * (copy of which is annexed) under section 103A of the Bengal Tenancy Act has been filed, and the date of its disposal has been fixed for the 190 , you are hereby informed that you should, on the day fixed, appear in this Court at at o'clock to produce any evidence you have. In case of your failing to appear at the time fixed, orders will be passed according to law.

Dated Month 190.

V.—Notice for settlement of fair rents in connection with a settlement of the land-revenue.

[*See Rule 22* (a) *of these Rules and Part III, Chapter 6 Rule 10, of the survey and Settlement Manual, 1900, and its Appendix A, Form No. 5.*]

NOTICE to the proprietors, tenure-holders, *raiyats*, under-*raiyats*, and occupants of—

Village , | *Thana* ,
Pargana , | District :

Take notice that, on at , I shall proceed to fix fair and equitable rents for all the tenants of the above-mentioned village. All persons to whom this notice is addressed are called upon to attened at the place named above on the date specified.

Revenue-officer.

VI—Notice for publication of a Table Rate.

[*See Rule 26* (a), *Chapter VI, of the Bengal Tenancy Act Rules and Part III, Chapter 6 Rule 12, of the Survey and Settlement Manual 1900 and its Appendix A, Form No 6.*]

NOTICE to the proprietors, tenure-holders, landlords, *raiyats*, under-*raiyats*, and occupants of—

Village , | *Pargana* ,
Thana , | District ,

Take notice that a table of rates for the above-mentioned village has been prepared, and that it will be published in the village on the day of
All persons interested are called upon to attend on the date specified.

Revenue-officer.

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* NOTE.—Parties should be required to file copies of their petitions of objection for service.

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VII.—Notice for the publication of a Settlement Rent-Roll.

[*See Rule 32, Chapter VI, of the Tenancy Act* Rules, *and part III, Chapter 6, Rule 15, of the Survey and Settlement Manual, 1900, and its Appendix A, Form No. 7.*]

Village , | *Pargana* ,
Thana , | District ,

Take notice that, fair rents having been settled for all tenants in the above-mentioned village, a Settlement Rent-Roll has been prepared, and that this rent-roll will be published by its contents being read out in the village on the
All persons interested are called upon to attend.

Revenue-officer.

VIII.—Notice for final publication of the record.

[*See Rule 35, Chapter VI, of the Tenancy Act Rules, and Part III, Chapter 7, Rule 1, of the Survey and Settlement Manual, 1900. and its Appendix A, Form No. 8.*]

NOTICE to the proprietors, tenure-holders, landlords, *raiyats,* under-*raiyats,* and occupants of—

Village , | *Thana* ,
Pargana , | District :

Take notice that, all objections under section 103A of the Tenancy, Act having been decided by the Revenue-officer *and* the *Settlement Rent-Roll having been incorporated in the record-of-rights,** the record of the above-mentioned village has been finally framed and will be published by its contents being read out in the village on the
All persons interested are called on to attend on this date

Revenue-officer.

IX.—Notice for service on persons interested in an application made by landlord or tenant for settlement of fair rents.

[*See Rule 38, Chapter VI, of the Tenancy Act Rules, and Part III Chapter 8, Rule 2, of the Survey and Settlement Manual, 1900, and its Appendix A, Form No. 9*]

To

WHEREAS (here state name, description, and address of applicant or applicants) landlords/tenants have made an application in which you are interested, for the settlement of a fair rent for lands in village , a copy of the application/an extract containing such parts of the application as concern you is hereby served on you, and you are hereby summoned to appear in this Court in person or by duly-authorised agent at o'clock on the at for final disposal of the application. In default of your appearance on the day mentioned, the application will be heard and determined in your absence. You should bring or send by your agent on the day fixed any document or evidence on which you intend to rely.

Revenue-officer

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* The words in italics to be omitted in cases in which a settlement of land-revenue is not being made.

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SCHEDULE II.

(Referred to in Chapter II, Rule 1.)

Published under Government Notification dated the 23rd May 1888.

District.	Local areas.	Staple food-crops proposed by the Collector.	Marts at which prices to be taken.
1	2	3	4
PATNA DIVISION.			
PATNA ...	Sadar sub-division, excluding thana Maner.*	*Makai* up-land ...	Maroofganj.†
		Rice low-land ...	
	Barh ditto ...	*Makai* up-land ...	Barh.
		Rice low-land ...	
	Biher ditto ...	Wheat up-land ...	Bihar.
		Rice low-land ...	
	Dinapur ditto with thana Maner.*	Barley up-land ...	Dinapur.
		Rice low-land ...	
GAYA ...	Sadar ditto ...	Wheat up-land ...	Gaya
		Rice low-land ...	
	Nawada ditto ...	Wheat up-land ...	Nawada.
		Rice low-land ...	
	Jahanbad ditto ...	Wheat up-land ...	Jahanabad.
		Rice low-land ...	
	Aurangabad ditto ...	Wheat up-land ...	Aurangabad.
		Rice low-land ...	
SHAHABAD ...	Sadar ditto ...	Wheat up-land ...	Arrah.
		Rice low-land ...	
	Buxar ditto ...	Wheat up-land ...	Buxar.
		Rice low-land ...	
	Sasaram ditto ...	Wheat up-land ...	Sasaram.
		Rice low-land ...	
	Bhabua ditto ...	Wheat up-land ...	Bhabua.
		Rice low-land ...	

* *Vide* Government Notification No. 1701L.R., dated the 31st March 1896.
† *Vide* Government Order No. 1702L.R. dated 1st April 1896.

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SCHEDULE II—(*contd*).

District.	Local areas.	Staple food-crops proposed by the Collector.	Marts at which prices to be taken.
1	2	3	4
	Patna Division—(*contd*..)		
Muzaffarpur	Sadar ditto	*Mokai* up-land ... Rice low-land ...	Muzaffarpur.
	Sitamarhi ditto	*Mokai* up-land ... Rice low-land ...	Sitamarhi.
	Hajipur ditto	*Makai* up-land ... Rice low-land ...	Hajipur.
Darbhanga ...	Sadar ditto	*Murwa* up-land* ... Rice low-land ...	Darbhanga.
	Madhhubani ditto	*Murwa* up-land* ... Rice low-land ...	Madhubani.
	Samastipur† ditto	*Makai* up-land ... Rice low-land ...	Samastipur.‡
Champaran ...	Sadar sub-division	*Makai* up-land ... Rice low-land ...	Motihari.
	Betia ditto	*Makai* up-land ... Rice low-land ...	Bettiah.
Saran ...	Sadar ditto	*Makai* up-land ... Rice low-land ...	Chapra.
	Gopalganj ditto	*Makai* up-land ... Rice low-land ...	Mirganj.
	Siwan ditto	*Makai* up-land ... Rice low-land ...	Siwan.
	Bhagalpur Division.		
Monghyr ...	Sadar ditto	Wheat up-land ... Rice low-land ...	Monghyr.
	Begusarai ditto	Wheat up-land ... Rice low-land ...	Begusarai.
	Jamui ditto	Wheat up-land ... Rice low-land ...	Jamui.

* *Vide* Government Notification dated the 8th November 1888.
† Government Notification No. 2131L.R., dated the 29th April 1896.
‡ Government Notification dated the 27th January 1890.

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SCHEDULE II—(*contd.*)

District.	Local areas.	Staple food-crops proposed by the Collector.	Marts at which prices to be taken.
1	2	3	4
	Bhagalpur Division—(*contd.*)		
Bhagalpur ...	Sadar ditto ...	*Makai* up-land ... / Rice low-land ...	Bhagalpur.
	Banka ditto ...	*Makai* up-land ... / Rice low-land ...	Banka.
	Madhipura ditto ...	*Murwa* up-land ... / Rice low-land ...	Madhipura.
	Supaul ditto ...	*Murwa* up-land ... / Rice low-land ...	Supaul.
Purnea	Sadar ditto ...	Wheat up-land ... / Rice low-land ...	Kasba.
	Araria ditto ...	Wheat up-land ... / Rice low-land ...	Araria.
	Kishanganj ditto ...	Wheat up-land ... / Rice low-land ...	Kishanganj.
Malda ...	District of Malda ...	Rice	Balia Nawabganj.*
	Chittagong Division.		
Chittagong ...	Sadar sub-division ...	Rice	Chittagong.
	Cox's Bazar ditto ...	Do.	Cox's Bazar.
Noakhali ...	Sadar ditto ...	Do.	Kalitara Hât.
	Fenny ditto ...	Do.	Fenny Hât.†
Tippera ...	Sadar ditto ...	Do.	Comilla.
	Brahmanbaria ditto ...	Do.	Brahmanbaria.
	Chandpur ditto ...	Do.	Chandpur.
	Burdwan Division.		
Burdwan ...	Sadar sub-division ...	Rice	Burdwan.
	Raniganj ditto ...	Do.	Raniganj.
	Katwa ditto ...	Do.	Katwa.
	Kalna ditto ...	Do.	Kalna.
Midnapore ...	Sadar ditto ...	Do.	Midnapore.
	Ghattal ditto ...	Do.	Ghattal.
	Tamluk ditto ...	Do.	Tamluk.
	Contai ditto ...	Do.	Contai.

* *Vide* Government Notification No. 2084 L. R., dated the 16th April 1894.
† Government Notification dated the 9th April 1889.

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SCHEDULE II—(*contd.*)

District.	Local areas.	Staple food-crops proposed by the Collector.	Marts at which prices to be taken,
1	2	3	4
	Burdwan Division—(*concld*).		
Birbhum ...	Sadàr sub-division...	Rice	Suri
	Rampur Hât ditto ...	Do.	Rampur Hât.
Hooghly ...	Sadar ditto ...	Do.	Hooghly.
	Serampur ditto ...	Do.	Bhadreswar.
	Jahanabad* ditto ...	Do.	Jahanabad.
	Howrah ditto ...	Do.	Motihari.
	Ulubaria ditto ...	Do.	Ulubaria.
Bankura ...	Sadar ditto ...	Do.	Bankura.
	Bishenpur ditto ...	Do.	Bishenpur.
	Rajshahi Division.		
Rajshahi ...	Sadar sub-divison	Rice	Boalia.
	Nowgong ditto ...	Do.	Nowgong.
	Nator ditto ...	Do.	Nator.
Pabna ...	District of Pabna ...	Do.	Pabna.
Rangpur ...	Sadar sub-division	Do.	Rangpur.
	Nilphamari ditto ...	Do.	Nilphamari.
	Kurigaon ditto ...	Do.	Kurigaon.
	Gaibandha ditto ...	Do.	Gaibanda.
Dinajpur ...	District of Dinajpur ...	Do.	Railway Bazar Hat.
Bogra ...	District of Bogra ...	Do.	Bogra.
Jalpaiguri ...	Sadar sub-division ...	Do.	Jalpaiguri Dinbazar.
	Dacca Division.		
Dacca ...	Sadar sub-division	Rice	Dacca.
	Narayanganj ditto ...	Do.	Muddenganj.
	Manikganj ditto ...	Do.	Manikganj.
	Munshiganj ditto ...	Do.	Mirkadim ‡
Faridpur ...	Sadar ditto ...	Do.	Faridpur.
	Goalundo ditto ...	Do.	Goalundo.
	Madaripur ditto ...	Do.	Madaripur.
Mymensing ...	Sadar ditto ...	Do.	Nasirabad.
	Tangail ditto ...	Do.	Kagmari.
	Jamalpur ditto ...	Do.	Jamalpur.
	Kishorganj ditto ...	Do.	Kishorganj.
	Netrakona ditto ...	Do.	Netrakona.

* Since named Arambagh.
† Government Notification No. 638T.—R., dated the 23rd June 1899.
‡ *Vide* Government Notification No. 2644 L. R., dated the 8th August 1899.

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SCHEDULE II—*(contd.)*

DISTRICT.	Local areas.	Staple food-crops proposed by the Collector.	Marts at which prices to be taken.
1	2	3	4
	DACCA DIVISION—*(concld.)*		
BACKERGUNGE	Sadar sub-division	Rice	Barisal.
	Patuakhali ditto ...	Do.	Patuakhali.
	Pirojpur ditto ...	Do.	Pirojpur.
	Dakhin Shahbazpur ...	Do.	Bhola.
	PRESIDENCY DIVISION.		
MURSHIDABAD.	Sadar sub-division	Rice	Berhampur.
	Lalbagh ditto ...	Do.	Lalbagh.
	Kandi ditto ...	Do.	Kandi.
	Jangipur ditto ...	Do.	Jangipur.
NADIA ...	Sadar ditto ...	Do.	Goari.
	Ranaghat ditto ...	Do.	Ranaghat.
	Meherpur ditto ...	Do.	Kaliabazar.
	Chuadanga ditto ...	Do.	Chuadanga,
	Kushtia ditto ...	Do.	Bahadurkhali.
JESSORE ...	Sadar ditto ...	Do.	Jessore.
	Narail ditto ...	Do.	Narail.
	Magura ditto ...	Do.	Magura.
	Jhenida ditto ...	Do.	Jhenida.*
	Bongong ditto ...	Do.	Bongong.
24-PARGANAS ...	Sadar ditto ...	Do.	Chetla Hât.
	Barasat, Dum-Dum, and Barrackpur sub-divisions.	Do.	Barasat.
	Diamond Harbar sub-division.	Do.	Mugra Hât.
	Barasat subdivision ...	Do.	Baduria Baron.
KHULNA ...	Sadar ditto ...	Do.	Khulna.
	Satkhira ditto ...	Do.	Satkhira.
	Bagirhat ditto ...	Do.	Bagirhat.

* Government Notification dated the 1st August 1889.

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SCHEDULE II—(*concld.*)

ORISSA DIVISION*

Government Notification No. 2086 R.L., dated the 27th of April 1896.

DISTRICT.	Local areas.	Staple food-crops proposed by the Collector.	Marts at which prices te be taken.
1	2	3	4
CUTTACK ...	Sadar sub-division	Rice	Cuttack town.
	Jajpur ditto ...	Do.	Jajpur town.
	Kendrapara ditto ...	Do.	Kendrapara town
	Banki ditto ...	Do.	Charchika Hât.
PURI ...	Sadar ditto ...	Do.	Puri.
	Khurda ditto ...	Do.	Khurda.
BALASORE ...	Balasore Sadar ditto ...	Do.	Bhadrak.
	Bhadrak ditto ...	Do.	Chandbali †

* Amended by Government Notification No. 4307 L.R., dated 7th November 1896, published in Part I, page 1150, of the *Calcutta Gazette* of the 11th idem.

† Added by Government Notification No. 4306L.R, dated 7th November 1896, published in Part I, page 1149, of the *Calcutta Gazette* of the 11th idem.

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FORMS to be used in the preparation of the settlement record*

No. I.

Khewat (Part I) of revenue-paying lands, containing the names of the proprietors, and the extent and character of the interests. See Rule 9, Chapter VI, Tenancy Act Rules. †

Mauza Mauzawar Register No. Pargana Thana

Serial number.	Name of estate or share of—		Number in revenue-roll and separate account number if any.	Names and addresses of the proprietors, managers and mortgagees of the estate with the character and extent of each proprietor's, manager's or mortgagee's interest.		Area contained in the village belonging to each estate to be shown separately.				Government revenue of the estate.	REMARKS.
						In acres.			In bighas, drones or kanis or mans, each containing square yards.		
	Name of estate.	Name of share of estate, if any.		Name, parentage, and residence.	Character and extent of interest.	Cultivated.	Not cultivated.	Total.	Total.		
1	2	3	4	5	6	7	8	9	10	11	12

* Taken from the Board's Survey and Settlement Manual, 1901, Appendix G, pp. lxvi, lxiv. These are the standard forms; but they are modified to suit local conditions whenever this is thought necessary.

† See also Board's Survey and Settlement Manual, Part II, chap. 8, rules 6, 18—34.

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No. 2.

*Khewat (Part II) of revenue-free lands, showing lands held exempt from Government revenue in perpetuity. (Rent-free land should not be entered in this).**

Mauza Pargana Thana

Mauzawar Register No.

Serial number.	Description and character of Revenue—free property, whether jagir, aiamgah, &c.	Name, Parentage, and residence of the Proprietor, Manager, or mortgagee of the Revenue-free land, with the character and extent of the interest of Proprietor, Manager or mortgagee.		Number in mauzawar register of the Collectorate.	Area according to present measurement.				Reference to entries in earlier register relating to the property or any part thereof.	Remarks.
		Name, parentage, and residence.	Character and extent of the interest.		In acres.			In bighas of square yards Total.		
					Cultivated.	Not cultivated.	Total.			
1	2	3	4	5	6	7	8	9	10	11

* See Board's Survey and Settlement Manual, Part II, Chap. 8, rules 6 and 25.

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No. 3.

*form of Record of interests of Patnidar, Thikadar, Ijaradar, or other large and important tenure-holders. See Rule 9 (b), Chapter VI, Tenancy Act Rules.**

Mauza • Mauzawar Register No. Pargana Thana

Number.	Name of tenure-holder.	Name of estate and number in column 1 of the proprietary khewat.	Name or names of tenure-holder's landlord or landlords.	Extent of tenure-holder's interest.	Area held by tenure-holder in acres (if he has specific possession).	Area in bighas of—square yards to the acre.	Rent payable by tenure-holder.	Mode in which rent was fixed.	Period for which the rent has been fixed from—to—	Nature, conditions, and incidents of the tenure.	REMARKS.
1	2	3	4	5	6	7	8	9	10	11	12

N. B.—*column* 11—In the case of tenure which has been created by a registered deed, merely the registration number, date of the deed, and the name of the office in which registered deed be recorded in this column.

* See also Board's Survey and Settlement Manual, Part II, Chapter 8, Rules 6 and 26.

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Mauza { *Name*——— *No.*———

Name of Amin

FIELD.		Name a Tauzi number Estate and sha of Esta	REA.						Dofasli.		UNCROPPED AREA.			Class of soil.	REMARKS.
				Rabi.											
Number.	Boundaries.		a. D.	Crop.	Area. A.	Area. D.			A.	D.	Class.	Area. A.	Area. D.		
1	2	3	4	15	16				17		18	19		20	21

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SLIP.

N

Name of in

1. Serial nu

12. Accou
landl
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Rent

Cess

Total

17. Statu
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Khasra number of fields and boundaries.		Description of land.	Remarks.
Number.	Boundaries.		
3	4	5	6

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Khasra number of field and boundaries.		Description of land.	If rent not paid in cash, note nature of rent, if any.	Cultivated area.		Uncultivated area.		Total area.					Remarks.
Number.	Boundaries.			A.	D.	A.	D.	A.	D.	B.	K.	Dh	
3	4	5	6	7		8		9		10			11

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(6)—*Specimen Form of Continuous Khatian.*

Pargana , Pargana or tappa , District
Mauza No.
Thana

A	Serial number of khatian.	Name, parentage caste, and residence of tenant.	Khasra number of field and boundaries.		Area included in the holding in acres and decimals.				Area in local measure.			Present rent ascertained by Revenue Officer.	Fair rent settled by Revenue Officer (if any).	Particulars of Tenancy.		Remarks.
			Number.	Boundaries.	Description.	Cultivated. A. D.	Uncultivated. A. D.	Total. A. D.	B.	K.	D.			Status and length of possession in case of non-occupancy tenants.	(1) Whether rent fixed by contract, order of Court, or otherwise. (2) Special conditions and incidents (if any). (3) Particulars of progressive rents.	Note entries which have been the subject of a case under section 106, Bengal Tenancy Act.
	1	2	3	4	5	6	7	8	9			10	11	12	13	14

Tauzi number and sub-number in the Khewat — Name of estate or portion of estate.
Name of landlord with reference to the khewat

1	2	3	4	5	6	7	8	9	10	11	12	13	14

NOTE.—(1) The portion of the heading marked A is to be printed as a slip, so as to be a continuons heading for all pages of the khatian volume.
(2) The portion marked B may be a slip to be pasted in the volume on any page or part of a page where the record of an estate or tenure uuder a separate landlord commences.
(3) If the landlord is a tenure-holder for whom a khewat has been prepared, reference will be made to the number of the khatian.
(4) If column 11 is filled up, column 10 may be left blank,
(5) When the entries affecting any estate or tenure are complete, columns, 3, 6, 7, and 8, 9, 10 or 11 are to be totalled before entering the particulars of the next estate or tenure.

* See Part III, Chapter 7, Rule 5 (Board's Survey and Settlement Manual, 1901.)

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APPENDIX III.

HIGH COURT RULES.

Rules under section 100.

1. Every manager, appointed under Chapter IX of the Bengal Tenancy Act, shall in all matters act in accordance with such orders as may, from time to time, be issued by the District Jndge.

2. The manager shall pay the Government revenue, rent and other demands of the like nature, as also all just liablities upon the estate, in due and proper time.

2. No manager shall have power to sell or mortgage any property, nor shall he grant or renew a lease for any period exceeding three years, without the express sanction of the District Judge. Provided that this rule shall not render valid any lease for a shorter time than three years, if the District Judge directs by a written order that his sanction is to be obtained as regards all leases granted by the manager.

4. The manager shall apply for the sanction of the District Judge to any act which may involve extraordinary expense.

5. No manager shall have power to compromise any suit or relinquish any claim without the express sanction of the District Judge.

Rules under Chapter XII.

6. All applications to distrain shall be presented and heard in open Court. The examination mentioned in section 123, sub-section (2) shall be on oath or affirmation.

7. All such applications and all notices of distraint under section 141 shall be entered in a register to be called the "Distraint Register," which shall be kept in the form annexed, p. 661. A copy of every such application, to be furnished by the applicant, shall be given to the officer appointed to make the distraint and a copy of the notice under section 141, to be similarly furnished by the applicant, shall be given to the officer placed in charge of the distrained property.

8. The officer deputed to make a distraint under section 124, or to take charge of produce distrained under section 141, must in all cases be able to read and write the language of the district.

9. The written demand under section 125, shall be framed in accordance with entries contained in the application or notice referred to in Rule 2.

10. The notification of distraint directed in section 124, Act VIII, 1885, shall be published by fixing up in a conspicuous part of the holding or other place, in which the produce is, a notice that such produce has been distrained, and by proclaming at the same time the contents of the notice by beat of drum.

11. The notice shall specify the name of the person at whose instance the distraint is made, the name of the defaulter, the name of the person in whose charge the produce has been placed, and the amount of the arrear due, and it shall direct any person intending to reap, gather, or store the crop or produce, if unreaped or ungathered or intending to do any other act necessary for its preservation, to give due notice of his intention to the person who has been placed in charge.

12. The notice shall be fixed up in the presence of not less than two persons, in addition to the agent of the distrainer, who points out the crop or produce.

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Form of Distraint Register prescribed by Rule 7.

Serial No. of		Name and address of the applicant under section 131 or of the person giving notice under section 141.	Date of application to distrain or of notice of distraint under section 141.	Name and address of the defaulter.	Amount of arrear claimed and period in respect of which it is claimed.	Purport of the order passed and date on which it is passed.	Name of the officer deputed to distrain, or to take charge of property distrained.	Date of distraint.	Date of sale proclamation.	Date of sale.	Amount realised by sale.				Amount if any deposited under section.		Remarks.
Application under section 131.	Notice under section 141.										Arrear.	Costs.	Surplus.	Total.	Arrear.	Costs.	
1	2	4	3	5	6	7	8	9	10	11	12	13	14	15	16	17	18

Note.—In the column for remarks shall also be entered the date of each remand granted. *(Inserted by C. O. No. 6 of 20th Feby. 1892.)*

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13. In the event of it being necessary for the distraining officer, or the officer placed in charge of distrained property, to reap, gather, or store any crop or produce, or to do any other acts for the due preservation of the same, as provided by section 126, the person at whose instance the distraint was made shall advance the funds necessary to this end.

14. The officer holding a sale under section 131 shall record a description of the property offered for sale, the names of all persons bidding for the same, and the amount bid by each; and, if the sale is postponed, he shall record an order to this effect, and shall then and there notify the place where, and the time when, the sale will be held.

15. When the sale is concluded and the sale proceeds are realised the officer who held the sale shall, after paying costs of the distraint and sale, as directed in section 134 forthwith pay the balance into Court.

16. The officer holding the sale shall take separate receipts for all sums paid by him as costs of the distraint and sale under section 134, sub-section (1), and if the person giving the receipt is unable to write, the receipt shall be attested by some person able to do so.

17. When a distraint is withdraw under section 136, the notification of distraint, published under section 124, shall be taken down.

18. All officers deputed to distrain property under this chapter shall, if there is a post office in the vicinity, report to the Court by letter immediately the distraint is made, or, if there is no such post office, shall immediately on his return, report in writing the nature and extent of the crop or produce distrained, the day on which the distraint was made, the name of the person (if any) placed in charge of the crop, and the day fixed for the sale, or if the sale has taken place, the day on which it took place. He shall also, immediately on his return file an account of all money received and disbursed by him, together with the receipts for the same and the record of the biddings at the sale, if a sale has taken place.

19. Every person, distraining produce by virtue of the authority conferred on him under section 141 of Act VIII, 1885, shall give notice of such distraint to the Civil Court having jurisdictions to entertain an applications for the distraint of such produce, in a tabular form which shall contain the following particulars :—

(*a*) The name and address of the person at whose instance the distraint was made and a description of his interest in the property, whether as proprietor, tenure-holder, or raiyat.

(*b*) The name of the defaulter, and of the place in which he resides, or was known to be last residing.

(*c*) The amount of the arear with interest, if any, and the period in respect of which it is claimed.

(*d*) The holding in respect of which the arrear is claimed, the boundaries thereof or such other particulars as may suffice for its identification.

(*e*) The description and approximate value of the produce distrained and if the same has been reaped or gathered, the place in which it is stored.

(*f*) The name of the person by whom the distraint was actually made, and the name and address of the person in whose charge the produce has been placed.

(*g*) The date on which the distraint was made.

(*h*) If the crop or produce is standing or ungathered, the time at which it is likely to be out or gathered.

Published in the *Gazette of India*, dated 7th August, 1889, Part II, pages 470 and 471, and in the *Calcutta Gazette*, dated the 28th July, 1886. Part I, pages 886 and 887.

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APPENDIX IV.

RULES FOR REGISTRATION OF DOCUMENTS UNDER THE BENGAL TENANCY ACT, VIII OF 1885.*

Leading provisions.

1. The sections of the Tenancy Act, which refer to the registration of documents, are sections 12, 18, 85, 175 and 176.

Section 12 has been amended by Act VIII of 1886, and has reference only to the transfer of a permanent tenure by gift, voluntary sale, or usufructuary mortgage, *i.e.*, where the mortgagor delivers possession and authorises the mortgagee to retain the rents and profits accruing from the property mortgaged [section 58 (*d*) of the Transfer of Property Act, IV of 1882].

Section 18 enacts that a raiyati holding at a fixed rent or fixed rate of rent is subject to the same provisions with respect to its transfer by gift, sale or mortgage as a permanent tenure.

The period allowed by section 175 for the registration of a certain class of documents expired on the 31st October, 1886, and after that date their registration was barred.

Section 176 relates to the notification of incumbrances to the landlord. For definition of the term "incumbrance," *see* section 161.

Examination of the deed.

2. A document presented for registration under sections 12, 18 and 175, shall be first examined with reference to Registration Rule 41, and next with reference to the particular section of the Tenancy Act under which it is presented. Care should be taken not to carry out the procedure under sections 12 and 18, unless it appears *on the face of deed itself* that the tenure transferred is a permanent tenure, or that the holding transferred is a holding at a rent, or rate of rent, fixed in perpetuity.†

Refusal of registration of sub-leases executed by raiyats creating a term exceeding nine years.

4. When a sub-lease executed by a raiyat purporting to create a term exceeding nine years is presented for registration, it shall be returned at once with a notice to the following effect recorded on its back, *viz.*, "*Not admissible under sub-section 2, section 85 of the Bengal Tenancy Act.*" The note shall be signed, sealed, and dated by the registering officer. The order of refusal will be entered in Book II.

Endorsement of certificate of admissibility.

5. In certifying the admissibility to registration of a document presented for registration under these rules, the registering officer shall quote registration Rule 41 as well as the particular section of the Tenancy Act under which it is admitted. Thus: *Admissible under Rule 41, also under section of the Bengal Tenancy Act. Correctly stamped under the Indian Stamp Act Schedule , No.*

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* See Govt. Notification No. 949 P. dated 21st. March, 1898, published in the *Calcutta Gazette* of March 23rd, 1898, Part I, p. 325.

† Rule 3, relating to the registrations of deeds of transfer of fractional shares of tenures or holdings, was withdrawn by Govt. Not., No. 1681 P., dated 19th Sept. 1899, published in the *Calcutta Gazette*, of Sept. 20th, 1899 Part I, p. 1233.

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The fees levied shall be noted below the certificate of admissibility in the following manner, *viz* :—

	Rs. A.	Rs. A.
Fees paid A	1 0	
Ditto R	1 4	
		2 4
Landlord's fee	2 0	
Process fee (in court fee stamps)	0 12	
Peon's charges, &c... ...	0 8	
		3 4
Total ...		5 8

Sub-Registrar.

Receipts for fees.

6. The amount of landlord's fee, peon's charges, &c., shall be entered in the printed receipt for the document granted under section 52 of the Registration Act. In calculating the amount of landlord's fee, pie should be omitted.

All documents to be entered in the ordinary Registration Fee-book.

7. The document shall be entered in the registration fee-book in order of presentation in the same manner as any other document presented under the Indian Registration Act. The registration fee shall be credited in column 7 with the necessary details, and included in the total of other registration fees for credit to Government. The serial number of the document in the Tenancy Act fee-book shall be noted in the column of remarks of the registration fee-book with letters T. A. for reference.

Process fees.

8. Fees for processes shall be paid in court-fee stamps. These stamps shall be affixed to the application for issue of processes issued, certifying that the fees have been paid, and the applications being retained in the offices of the registering officer. The stamps shall be cancelled by the registering officers in the manner prescribed in section 30 of the Court-fees' Act, *i.e.*, by punching out the figure head so as to leave the amount designated on the stamps untouched. The pieces punched out shall be immediately destroyed.

Peon's charges.

9. Charges on account of peons' railway fare, boat-hire or ferry charges shall be levied according to the rule quoted in paragraph 3 of Appendix A, subject to the instructions of the Collector of the District.

Tenancy Act Fee-book.

10. Landlords' fees, process fees, and charges, on account of peons' railway fare boat hire, or ferry charges, shall not be shown in the registration fee-book, but shall be shown separately in a fee-book called the Tenancy Act fee-book.

Tenancy Act Fee-book.

Serial number of notice	Serial number of document in Book 1.	Date of Presentation.	From whom received.	Nature of document.	Annual rent.			Landlord's fee.		Process fees in court-fee stamps.		Peon's boat-hire railway fair or ferry tolls.		Number of chalan or money-order used for remitting the fees to the Collector.		Number and date of letter sending notices to the Collector.	Signature of the registering officer.	Remarks.
1	2	3	4	5	6			7		8		9		10		11	12	13
					Rs.	A.	P.	Rs.	A.	Rs.	A.	Rs.	A.	Rs.	A.			

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11. Column 1 of the Tenancy Act fee-book should be filled up on the presentation of the document, whether the particular notice is ready or not. The number in that column should be transferred to the notice when it is ready. Columns 3 to 9 should also be filled up immediately on the presentation of the document. Columns 10 and 11 should be filled up on the date on which the notice and landlords' fees are sent to the Collector of the sub-divisional officer, as the case may be. The registering officer should affix his initials to each entry in column 11 of the Tenancy Act fee-book. The serial number of a copy sent under section 176 should be entered in the column of remarks.

Mode of filling up Tenancy Act fee-book.

12. Columns 7, 8 and 9 of the Tenancy Act fee-book shall be totalled daily, and the daily totals of all cash receipts—that is, all receipts except process fees paid in court-fee stamps—shall be posted in the cash book under the head of landlord' fees and peons' charges, &c.

Daily totals to be posted in cash book.

Preparation and forwarding of Notices under sections 12 and 18 of the Tenancy Act.

13. In the case of documents relating to the transfer of tenures under section 12, or of raiyati holdings at fixed rates under section 18, notices shall be prepared in accordance with Rule 1, Chapter V of the General Rules under the Tenancy Act, reprinted in Appendix B, as soon as execution has been admitted and the executant identified, and the endorsements referring thereto have been recorded. The form of the notice is shown in Schedule I of Appendix B.

14. The scale of fees to be levied for the service of notices is laid down in Appendix A.

15. When two or more persons are joint landlords and have no common Agent or Manager, only one notice should be issued and a single process fee levied.

16. The notice referred to in the preceding rule should be served in the manner directed in Appendix B. Postal charges for sending copies of notices under section 12 of the Bengal Tenancy Act to landlords should be met from, and not added to, the process fee. Postal charges for sending copies of notices to the Collector for transmission to landlords should be debited to the Registration Department, and those that may be incurred for their despatch to landlords from the Collectorate should be met by the Collector.

17. All notices or copies of notices shall be prepared in duplicate and shall, with peons' charges &c., be forwarded to the Collector of the distrcit or the subdivisonal officer of the subdivision, as the case may be, in which the landlords reside, for service upon them, under a covering letter. The form of the covering letter and of the notice will be found in Appendix B.

Notice, &c., how to be forwarded.

The landlord's fees will be forwarded to the Local Treasury Officer or Sub-Treasury Officer, as the case may be, under a covering letter to the following effect:—

To—The $\frac{\text{Treasury}}{\text{Sub-Treasury}}$ Officer of

SIR,

PLEASE receive for deposit Rs.————, being the amount of landlords' fees deposited by————————————for payment to————————, the landlord or to some person authorized on his behalf to receive it. The amount should remain at his credit, and should be paid to him, or sent to him through peon, or transferred to his revenue account, on application by him.

I have, &c.,

Sub-Registrar.

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Serial number of notice sent to landlords.	Name of landlords.	Their addresses.
56		
57		
58		
Total ...		

Seal.

18. When it is necessary to issue more notices than one, only one serial number should be entered in column 1 of the Tenancy Act Fee book. There will thus be one original notice in which the names of all the proprietors concerned will be entered, and as many copies of this original notice will be made as are necessary, each copy bearing the serial number of the original notice.

Copies of original notice.

19. One copy of the original notice shall be filed for reference in the Registration office, a note being made upon it of the number of copies sent.

Draft copy to be filed in the office.

20. When the landlord is himself the transferee, there is no occasion to levy fee or send notice.

No notice required when landlord is himself the transferee.

21. Notices for landlords in Calcutta should be sent to the Collector of the 24-Parganas for sevice.

Notices for landlords in Calcutta.

22. When a transferred tenure or holding is held jointly by several landlords residing in different districts, the notice with peons' charges and the landlords' fees should be sent to the Collector and the Treasury Officer, respectively, of the district in which the tenure or holding is situate.

Case of several landlords residing in different districts.

23. Landlord's fees shall be remitted to the Treasury Officer with the same regularity as is required in the case of remittance to the treasury of ordinary registration receipts, provided that such fees shall not be forwarded to the treasury until the registration of the deeds on which they are levied has been completed.*

Remittance of landlords' fees, &c.

24. Two separate chalans shall be prepared, one for the landlords fees credited in the Tenancy Act fee-book and sent to the Treasury Officer, and the other for the peons' charges, &c., credited in the Tenancy Act fee-book and forwarded to the Collector. For this purpose the details shall be entered on the reverse of the chalans. These shall be as follows :—

Form of chalan.

A.

Details of landlords' fees deposited.

1	2			3	4
Serial number of chalan.	Amount of landlords' fees deposited.			NAME OF DEPOSITOR.	Name of the landlord to whom payable.
	Rs.	A.	P.		

* As modified by Not. No 593 P. dated 19th Feby., 1900, published in the *Calcutta Gazette* of 21st Feby., 1900, Pt. I, p. 209.

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B.

Details of peons' charges, &c.

1	2	3	4	5		
Serial number of chalan.	Number of notices	NAME OF DEPOSITOR.	Name of the person to whom to be served and details of peons' charges, &c.	AMOUNT.		
				Rs.	A.	P.

24. Any fees realized which may remain in the hands of the registering officer may be refunded if the document is refused registration, a note to that effect being made in the column of remarks in the fee-book. Court-fee stamps may be returned, if they have not been punched. It is not necessary to enter these refunds in the monthly returns.

Refund of Tenancy Act fees.

25. A statement of operations under section 12 and 18 of the Tenancy Act shall be submitted monthly by Sub-Registrars. A statement for the whole district, countersigned by the Collector and the Treasury Officer, shall be submitted by each Registrar to the Inspector-General. The form of the statement will be found in the Appendix. The statement can be easily compiled from the fee-book, if column 5 is carefully filled up.

Monthly return.

Notification of Incumbrances to the Landlord uuder Section 176 of the Tenancy Act.

26. An application under section 176 for the notification of incumbrances to the landlords may be made either verbally or in writing, and when made in writing, it shall bear a court-fee stamp of annas eight. It shall be accompanied by the fee for the copy under Articles G and H of the schedule of fees under the Registration Act, as well as by the amount of process fees. A receipt for the amonnts thus taken shall be granted in the form (with necessary alteration) of receipt prescribed under section 52 of the Registration Act.

Application how made.

27. An entry shall at the same time be made in the Registration fee-book, and the fees credited to the Registration Department. The process fee shall be accounted for in the Tenancy Act fee-book, as directed in Rule 10. The serial number of the copy sent shall be noted in the column of remarks in the Tenancy Act fee-book.

Fee how shown.

28. The copy of the instrument under section 176 shall be forwarded to the Collector or the Subdivisional Officer, as the case may be, with a covering letter to the following effect:—

Copy of instrument to be forwarded with covering letter.

No.

Dated

To—The

SIR,

I HAVE the honour to forward the copy herein enclosed, and to request that it may be served on *A B*, resident of ——— ———, as required by section 176, Act VIII of 1885. Court-fee stamps for process fee of Rs.———are affixed to the copy.

I have, &c.,

Sub-Registrar of

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A notice in the form prescribed in Rule 17 is not required in transmitting a copy to the Collector or the Subdivisional Officer under section 176. The stamps received under that section are to be treated in the same manner as directed in Rule 8.

Process fee.

29. A copy of an instrument served in order to notify an incumbrance is equivalent to a notice under section 12, and registration officers are referred to Rule 3, Chapter I of the General Rules under the Tenancy Act, quoted below* for the procedure to be followed in serving such a copy.

Copying fees.

30. For every copy made under section 176 of the Bengal Tenancy Act, VIII of 1885, such copying fee, or copying and searching fees shall be charged as may be leviable under Article G, or under Articles G and H of the schedule of fees under the Registration Act for the time being in force. These shall be shown in the ordinary registration fee book, and not in the Tenancy Act fee-book.

Notification, No. 615 p.

The 20th February, 1900.—Whereas the operations for the cadastral survey of, and preparation of a record-of-rights in, the districts of Cuttack, Puri, Balasore, Muzufferpur, and Champaran have been completed, and it is accordingly practicable to describe houses not being houses in towns, and lands for the purposes of section 21 of the Indian Registration Act 1877, by reference to the detailed maps prepared in the course of those operations, the Lieutenant-Governor is pleased to make the following rule under the power vested in him by section 2 of the Indian Registration (Amendment) Act, 1899, and to direct that said rule shall come into force on and from the 1st June 1900 :—

In all areas within the district of Cuttack, Puri, Balasore, Muzufferpur, and Champaran, in which a cadastral survey has been made and a cadastral survey has been prepared, houses, not being houses in towns, and lands shall be described for the purposes of sec. 21 of the Indian Registration Act, 1877, by reference to the detailed maps prepared in the course of that survey (*Calcutta Gazette*, February 21, 1900, part I, p. 210).

A similar rule has been made with respect to houses, not being houses in towns, and lands in the districts of Saran and Chittagong (Government Notification No. 1153 P., dated 20th April, 1900, published in the *Calcutta Gazette* of April 25th, 1900, Part I, p. 396).

APPENDICES TO REGISTRATION RULES UNDFR THE TENANCY ACT.

APPENDIX A.

Scale of Fees (Sections 12 and 176 of the Bengal Tenancy Act, VIII of 1885). See Chapter VII of the General Rules framed by Government under the Tenancy Act. †

(1). *For service of notices.*—For the service of every notice under the Bengal Tenancy Act, VIII of 1885, not being a notice issued by any Revenue or Civil Court (fees for serving which are regulated by the Court fees Act), and not being provided for by any other rule made under this Act, process fee of 12 annas shall be levied, if the notice be directed to one or more persons residing in the same village.

(2). Where such notices are directed to several persons resident in different villages, a fee of 12 annas shall be levied for service in each village.

(3). In addition to the above fee, the actual charge, which must be incurred, it is necessary to travel by railway or boat or cross ferries will be levied from, and paid

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* *Ante*, p. 472. † *Ante*, p. 496.

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by, the person at whose instance the process is issued before issue of the process. If a peon carries more than one process, involving charges for railway fare, boat-hire, &c., the sum leviable will be charged in equal shares upon all the processes so carried. The rates at which such boat-hire is to be charged shall be the same as those fixed for criminal processes under Rule VII of the rules prescribed by the High Court under clause 2, section 20, Act VII of 1870 and shall be sufficient only to cover, on the whole, the actual cost of hiring boats, or of such boat establishment as it may be necessary to maintain for the purpose of serving processes of these classes.

APPENDIX B.

*Service of Notices under seetion 12 of the Bengal Tenancy Act, VIII of 1885, see Chapter V of the General Rules.**

(1). *Section 12*—Notices under this section shall contain, so far as may be possible, the particulars given in the forms specified in schedule I, and shall be served on the landlord or his agent; or, where two or more persons are joint landlords, on their common agent, referred to in section 188, or on their common manager appointed under section 95, as the case may be, in the manner prescribed for the service of summons on a defendant under the Code of Civil Procedure. Where there is more than one landlord, and no common agent or common manager has been appointed, the notice shall be served by being posted on the landlord's village office, if any; and if there be no village office, by fixing it up in the presence of not less than two persons on some conspicuous place on the tenure, and a copy shall also be forwarded by post in a letter registered under Part III of the Indian Post Office Act, to the person or persons to whom immediately preceding the transfer the rent had ordinarily been paid. The landlord's fee will be held in deposit in the Collector's office untill applied for by the landlord or some other person authorized on his behalf to receive it, or to send it to him through peon. The officer who will sign the notices shall initial the entry on account of the landlord's fee in the Deposit Register kept in the Treasury.

SCHEDULE I.

Notice under Section 12, Act VIII of 1885.

To—The $\frac{\text{Collector}}{\text{Subdivisional Officer}}$ of

LET this notice be served on *A. B.*, resident of , as required by section $\frac{12}{18}$ Act VIII of 1885. Peon's charges, &c., amounting to Rs. , is forwarded herewith.

C. D.,
Registering Officer.

To—*A. B.*, resident of

TAKE notice that the transfer of the tenure [or raiyati holding at fixed rates (as the case may be)] specified below, of which you are alleged to be the landlord, has been registered, and the landlord's fee of Rs. will be held in deposit in the Collector's Office till applied for by you, or some person authorized on your behalf to receive it.

* *Ante*, p. 478.

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The amount stands at your credit, and will be paid to you, sent to you through peon or transferred to your revenue account, on application :—

Tauzi number of estate.	Number of estate.	Description of tenure transferred, with village and pargana in which situated.	Annual rent of tenure.	Name, Father's name, and residence of transferor of tenure.	Name, father's name and residence of transferee of tenure.	Nature of transfer.	Date of registration of transfer.	Amount of landlord's fee.			Remarks.
1	2	3	4	5	6	7	8	9			10
								Rs.	A.	P.	

C. D.,
Registering Officer.

ORDERED that this notice be served on the abovenamed landlord.

E. F.
Collector.

RECEIVED a copy of the above mentioned notice.

Landlord.

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APPENDIX C.

Statement showing the operations under sections 12 and 18, Bengal Tenancy Act, in the Registry Office at for the month of 189 .

1	2		3		4				5	6		7		8		9		10		11		12	13	14
	DEEDS OF GIFT REGISTERED.		DEEDS OF SALE REGISTERED.		USUFRUCTUARY MORTGAGE.																			
					a	b	c	d																
NAME OF OFFICE.	Of permanent tenures.	Of raiyati holdings at fixed rates.	Of permanent tenures.	Of raiyati holdings at fixed rates.	Of permanent tenures of value above Rs. 100.	Of permanent tenures of value below Rs. 100.	Of raiyati holdings at fixed rates of value above Rs. 100.	Of raiyati holdings at fixed rates of value below Rs. 100.	Total number of registrations under sections 12 and 18.	Amount of landlord's fees realised during the month.*		Amount realised during the month on account of railway fare boat-hire, or ferry tolls.		Total amount of fees, &c. in hand at the beginning of the month.		Total of columns 6, 7 and 8.		Total amount fees, &c., remitted during the month to the Collector or Treasury officer.		Total amount of fees, &c. in hand at close of month.		Number of notices* sent during the month to Collector.	Number of notices* pending from previous month.	Number of notices* pending at close of month.
										Rs.	A.	Rs.	A.	Rs.	A.	Rs.	A.	Rs.	A.	Rs.	A.			

* Original notices only should be entered (*see* Rule 18).

Countersigned.
Treasury Officer

Countersigned.
Collector.

Registrar.

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APPENDIX V.

IMPORTANT NOTIFICATIONS.

Notifications relating to the Issue of Commission.

Notification, dated the 22nd July 1890; Calcutta Gazette, July 23, 1890, Part I, p. 756.

In modification of the Government notification, dated the 4th November 1885, the Lieutenant-Governor has been pleased to make, under section 392 of Act XIV of 1882, the following revised rules as to the persons to whom commissions shall be issued under the Bengal Tenancy Act:—

Whenever, under sections 31 (*b*) and 158 (2) of the Bengal Tenancy Act a Court directs that a local enquiry be held under Chapter XXV of the Code of Civil Procedure, the commission shall be issued to such person, not being below the rank of a Sub-Deputy Collector as the Collector of the district may, from time to time, select for the purpose.

The Court shall issue a precept to the Collector requiring him forthwith to nominate a fit person as above to conduct the enquiry, and the commission shall be issued to the person so nominated.

Notification No. 5073L. R. dated the 28th November 1895; Calcutta Gazette, dated the 4th of December, part I, p. 1146:—

Under section 392 of Act XIV of 1882, the Civil Procedure Code, and section 107 of the Bengal Tenancy Act, VIII of 1885, the Lieutenant-Governor is pleased to make the followiug rule as to the persons to whom commissions shall be issued by Revenue Officers empowered under Chapter X of the Bengal Tenancy Act:—

Whenever under the provisions of section 107 of the Bengal Tenancy Act, VIII of 1885, and Chapter XXV of the Civil Procedure Code, Act XIV of 1882, a Revenue Officer directs, that a local enquiry be held in the course of proceedings for the settlement of rents, the commission shall be issued to such person not being below the rank of a Sub-Deputy Collector or Revenue Officer invested with powers under Chapter X of the Bengal Tenancy Act, as the officer directing the enquiry shall appoint for this purpose.

Appointment of Special Judges to hear appeals under ss. 105 to 108.

Notification No. 1286L. E. Calcutta Gazette, Part I, p. 296, dated 13th March 1901.

The 7th March 1901.—The exercise of the power conferred by section 109A of the Bengal Tenancy Act, 1885, as amended by Bengal Act III of 1898, the Lieutenant-Governor is pleased to appoint the following District Judges to be Special Judges for the

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purpose of hearing appeals from the decisions of Revenue Officer under section 105 to 108 of the said Bengal Tenancy Act, 1885 :—

The District Judge of Faridpur.
" " " of Shahabad.
" " " of Noakhali.
" " " of the 24-Parganas.
" " " of Tippera.
" " " of Patna.
" " " of Backhergunge.
" " " of Bankura.
" " " of Dacca.
" " " of Pabna (with Bogra).
" " " of Dinajpur.
" " " of Mymensingh.
" " " of Jessore.
" " " of Nadia.
" " " of Cuttack (with Puri & Balasore).
" " " of Saran (with Champarun).
" " " of Muzafferpur (with Darbhanga).

Appointment of Deputy Collectors to discharge fuuctions of a Revenue Officer under s. 103.

Notification No. 1007 **T. R., Calcutta Gazette, Part I, p. 880, July** 10, 1901 :—

The 5th July 1901.—All Deputy Collectors in the Lower Provinces of Bengal are hereby authorised to discharge the functions of a Revenue Officer under s. 103 of the Bengal Tenancy Act, VIII of 1885, as amended by Act III (B. C.) of 1898, and are vested with the powers mentioned in section 189 (*a*) and (*b*) of the Act, under Rule 54, Chapter VI of the Rules framed by Government under that Act and published in the *Calcutta Gazette* under Notification No. T. R., of this date.

Settlement officer authorised to take down evidence in English language.

Notification No. 4445 L. R. Calcutta Gazette, 1st January 1902, **Part I, p. 2.**

The 24th December 1901.—All officers who have, or may hereafter be, vested by His Honor the Lieutenant-Governor with the powers of an Assistant Settlement Officer under Rule I, Chapter VI of the Rules under the Bengal Tenancy Act, are hereby authorised under section 185 (*a*) of the Civil Procedure Code, to take down evidence with their own hands in the English language in proceedings held under Chapter X of the Bengal Tenancy Act, VIII of 1885, as amended by Act III (B. C.) of 1898, in which an appeal is allowed in accordance with the procedure laid down in the aforesaid Code for the trial of suits.

Notifications extending Act VIII of 1885 (as amended by Bengal Act III of 1898) to the Jalpaiguri District.

No. 963T. R.—The 5th November, 1898.—In exercise of the powers conferred by sections 5 and 5A of the Scheduled Districts Act, XIV of 1874, and with the previous sanction of the Governor General in Council, the Lieutenant Governor of Bengal is

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pleased to extend the Bengal Tenancy Act, VIII of 1885,* to the whole of the Jalpaiguri district except the Western Duars, with effect from the 1st of January 1899, subject to the following restrictions and modifications, namely :—

I.—sub-section (*2*) and (*3*) of section 1 of the said Act shall be omitted; and

II.—the words "in the territories to which this Act extends by its own operation" in sub-section (*1*) and the whole of sub-section (*2*) of section 2 of the said Act shall be omitted.

[Published in Calcutta Gazette 9th November, 1898, Part I, Page 1156A.]

No. 964T. R.—The 5th November 1898.—In exercise of the powers conferred by the Scheduled Districts Act, XIV of 1874, section 5 and section 5A (inserted by the Repealing and Amending Act, 1891), and with the previous sanction of the Governor General in Council, the Lieutenant-Governor of Bengal is pleased to extend the Bengal Tenancy Act, VIII of 1885,* to the portion of the Jalpaiguri district known as the Western Duars, with effect from the 1st January 1899, subject to the following restrictions and modifications, namely :—

I. - Sub-section (*2*) and (*3*) of section 1 of the said Bengal Tenancy Act shall be omitted.

II.—The words "in the territories to which this Act extends by its own operation" in sub-section (*1*) and the whole of sub-section (*2*) of section 2 of the said Act shall be omitted.

III.—Nothing in the said Bengal Tenancy Act, other than the provisions of sub-section (*1*) of section 2, as modified by clause II of this notification, shall apply to any lands heretofore or hereafter granted or leased by Government to any person or company under an instrument in writing for the cultivation of tea or for the reclamation of land under the Arable Waste Land Rules.

IV.—Where there is anything in the said Bengal Tenancy Act wich is inconsistent with any rights or obligations of a *jotedar, chukanidar, dar-chukanidar, adhiar,* or other tenant of agricultural land as defined in settlement proceedings heretofore approved by Government, or with the terms of a lease heretofore granted by Government to a *jotedar, chukanidar, dar-chukanidar, adhiar,* or other tenant of agricultural land, such, rights, obligations, or terms shall be enforceable notwithstanding anything contained in the said Act.

(Published in *Calcutta Gazette,* 9th November 1898, Part I, page 1156A.)

Notifications extending Act VIII of 1885 (in part) and Bengal Act III of 1898 to the Division of Orissa.

The 10th September, 1891.—Under section 1 clause (3) of the Bengal Tenancy Act, the Lieutenant-Governor, with the previous sanction of His Excellency the Governor General in Council, is pleased to extend the following portions of the Act to the Division of Orissa :—

Chapter X † and sections 3 to 5, 19 to 26, 41 to 49, 53 to 75 and 191.

(Published in Calcutta Gazette, 16th September, 1891, Part I, page 839.)

No. 2448L. R.—The 27th June, 1892.—Under section 1 clause (3) of the Bengal Tenancy Act, VIII of 1885, the Lieutenant-Governor, with previous sanction of His Excellency the Governor General in Council, and in continuations of the Bengal Government's Notification, dated the 10th September, 1891, published in the Calcutta

* This includes the amending Act, Ben. Act III of 1898, which was law when this Notification was published.

† This extension of Chapter X is superseded by the extension to Orissa of Ben. Act III of 1898, which enacts a new Chapter X.

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Gazette of the 16th *idem*, Part I, page 839 is pleased to extend sections 27—38 and 80 of the Act to the Division of Orissa.

(Published in Calcutta Gazette, 29th June, 1892, Part I page 673)

No. 115 L.R.—The 5th January, 1893.—Under section 1, clause 3 of the Bengal Tenancy Act, VIII of 1885, the Lieutenant-Governor, with the previous sanction of His Excellency the Governor General in Council, and in continuation of the Bengal Government Notification No. 2448L R, dated the 27th June 1892, published in the Calcutta Gazette of the 29th June 1892, Part I, page 673, is pleased to extend sections 189 and 190 of the Act to the Division of Orissa

(Published in Calcutta Gazette, 11th January 1893, Part I, page 20.)

No. 99 L.R.—The 7th January, 1896.—Under section 1 clause 3 of the Bengal Tenancy Act, VIII of 1885, the Lieutenant Govener, with the previous sanction of His Excellency the Governor General in Council, and in continuation of the Bengal Government Notification No. 115L R, dated 5th January, 1893, published at page 20, Part 1 of the Calcutta Gazette of the 11th *idem*, is pleased to extend section 39 of the Act to the Division of Orissa.

(Published in Calcutta Gazette, 8th January, 1896, part 1, page 28.)

No. 971 T.R.—The 17th October, 1896.—Under section 1, clause 3 of the Bengal Tenancy Act, VIII of 1885, the Lieutenant-Governor, with the previous sanction of His Excellency Governor General in Council, and in continuation of the Bengal Government Notification No. 99, dated the 7th January, 1896, published at page 28, Part I of the Calcutta Gazette of the 8th *idem*, is pleased to extend sections 7, 40, 52 and 192 of the Act to the Division of Orissa.

(Published in Calcutta Gazette, 21st October, 1896, Part I, page 1081)

No. 957 T.R.—The 5th November 1898.—Under section I, clause (3) of the Bengal Tenancy Act, VIII of 1885, the Lieutenant-Governor, with the previous sanction of His Excellency the Governor-General in Council, is pleased to extend the provisions of the Bengal Tenancy (Amendment) Act, III of 1898, to the Division of Orissa.

[Published in *Calcutta Gazette*, 9th November 1898, Part I, p. 1156A.]

Notification extending parts of Act VIII of 1885 *to the Chota Nagpur Division (except the district of Manbhum).*

No. 721 L.R.—The 9th February 1903.—In exercise of the powers conferred by sections 5 and 5A of the Scheduled Districts Act, 1874 and with the previous sanction of the Governor-General in Council, the Lieutenant-Governor is pleased to extend to the Chota Nagpur Division, except the district of Manbhum, the portions of the Bengal Tenancy Act, 1885 [as amended by the Bengal Tenancy (Amendment) Act, 1898], which are specified in column 1 of the following table, subject to the restrictions and modifications specified in column 2 of that table :—

Portions of the Bengal Tenancy Act, 1885 [as amended by the Bengal Tenancy (Amendment) Act, 1898].	Restrictions and modifications.
1	2
Chapter I, section 1, sub-section (1) ...	.....
,, ,, 3, clause (1) ...	*For* Collector *read* Deputy Commissioner.
,, ,, 3, ,, (2) ...	.....
,, ,, 3, clauses (3) and (4).	.....

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Portions of the Bengal Tenancy Act, 1885 [as amended by the Bengal Tenancy (Amendment) Act, 1898].	Restriction and modifications.
1	2
Chapter I : section 3, clause *(7)* ...	*For* or an under-tenure-holder *read* and includes and under-tenure.
,, ,, 3, ,, (15) ...	.....
,, ,, 3, ,, (17) ...	.....
,, II : ,, 5, sub-section (1) ...	.....
,, X : ,, 101, ,, (1) ...	*Omit* in any case with the previous sanction of the Governor-General in Council, and may, if it thinks fit, without such sanction in any of the cases next hereinafter mentioned.
Chapter X : section 101, sub-sections (3) and (4).	.....
,, ,, 102 ...	*Omit the words from* and may include *to the end.*
,, ,, 103A ...	In sub-section (2) *omit* and (if a settlement of land-revenue is being or is about to be made) the Settlement Rent-Roll has been incorporated with the record under section 104F, sub-section (3).
,, ,, 103B ...	.....
,, ,, 104G, sub-section (2).	*For* Part *read* Chapter.
	Omit but not so as to affect any order passed by a Civil Court under section 104H.
,, ,, 111 ...	*Omit* subject to the provisions of section 104H.
,, ,, 111A ...	*Omit* or, save as provided in section 104H, for the alteration of any entry in such a record of a rent settled under sections 104A to 104F.
	In the proviso *omit* framed in pursuance of an order made under section 101, sub-section (2), clause *(d)*.
,, ,, 114 ...	*Omit* in any case except where a settlement of land-revenue is being or is about to be made.
Chapter XIII : section 148 opening words and clause *(b)*.	*For* section 50 of the Code of Civil Procedure, *read* sections 46 and 47 of the Chota Nagpur Landlord and Tenant Procedure Act.
Chapter XVII : section 189 ...	.....
,, ,, 190 ...	In sub-section (2) *omit* or High Court *and omit* and in the case of rules made by any other authority, in the prescribed manner.
,, ,, 195 ...	*Omit* clauses *(b)*, *(c)*, *(d)* and *(e)*.

[Published in *Calcutta Gazette*, 11th February 1803, Part I, p. 172.]

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Notifications extending section 31A (1) of Act VIII of 1885.

No. 1470T. R.—The 1st September 1900.—It is hereby notified for general information that the Lieutenant-Governor has been pleased to extend the provisions of section 31A (1) of the Bengal Tenancy Act, VIII of 1885, as amended by Act III (B. C.) of 1898, to the district of Tippera.

[Published in *Calcutta Gazette*, 5th September 1900, Part I, p. 970.]

No. 1091 L. R.—The 18th February 1904.—It is hereby notified for general information that the Lieutenant-Governor has been pleased to extend the provisions of section 31A (1) of the Bengal Tenancy Act, VIII of 1885, as amended by Act III (B. C.) of 1898, to Government Estate Taufir Barhia, bearing tauzi No. 1309, in the district of Monghyr.

[Published in *Calcutta Gazette*, 1904, Part I, p. 317.]

Notification declaring parts of Act VIII of 1885 to be in force in the Sonthal Parganas.

No. 771 L. R.—The 20th February 1897.—Under the powers vested in him by section 3 of Regulation III of 1872 (Sonthal Parganas Settlement Regulation), as amended by Regulation III of 1886, the Lieutenant-Governor directs that section 84 of the Bengal Tenancy Act, VIII of 1885, shall have force and effect in the Sonthal Parganas from this date.

[Published in *Calcutta Gazette*, 24th February 1897, Part I, p. 281.]

No. 1338 L. R.—The 1st March 1904.—Under the powers vested in him by section 3 of the Sonthal Parganas Settlement Regulation, III of 1872, as amended by section 3 of the Sonthal Parganas Justice and Laws Regulation, III of 1899, the Lieutenant-Governor directs that section 56 and clauses (*1*) and (*2*) of section 58 of the Bengal Tenancy Act, VIII of 1885, shall be deemed to be in force in the Sonthal Parganas from this date.

[Published in *Calcutta Gazette*, 2nd March 1904, Part 1, p, 347.]

NOTIFICATIONS AS TO THE COMMENCEMENT AND LOCAL EXTENT OF THE BENGAL TENANCY ACT, 1885.

Commencement of Act.

The 4th September 1885.—In exercise of the powers vested in him by section 1 (2) of the Bengal Tenancy Act, and with the sanction of the Governor-General in Council, the Lieutenant-Governor is pleased to declare that the Act shall come into force on the 1st November 1885.

[Published in *Calcutta Gazette*, 9th September 1885, Part I, p. 874.]

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